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ENGLISH REPORTS

IN LAW AND EQUITY:

CONTAINING REPORTS OF CASES IN THE

House of Lords, Privy Council,

COURTS OF EQUITY AND COMMON LAW;

AND IN THE

Admiralty and Ecclesiastical Courts;

INCLUDING ALSO

CASES IN BANKRUPTCY AND CROWN CASES RESERVED.

EDITED BY

EDMUND H. BENNETT AND CHAUNCEY SMITH,

COUNSELLORS AT LAW.

VOLUME XIV.

Containing Cases in the House of Lords, the Queen's Bench, Common Pleas, and Exchequer; the Court of Criminal Appeal, and the Ecclesiastical Courts, during the years 1852-53.

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DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
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CASES
ARGUED AND DETERMINED
IN THE
HOUSE OF LORDS;
DURING THE YEAR 1851.

GEILS, Appellant, v. GEILS, Respondent.¹

May 8, 1851.

*Appeal, Competency of — Pleading — Dilatory Defence — Practice,
Right to begin — Costs.*

A plea which does not merely raise an objection to a particular form of proceeding, leaving it to the plaintiff to proceed in a different form at another time, but which, if allowed, entirely bars the plaintiff from his remedy, is a peremptory and not a dilatory plea, within the 6 Geo. 4, c. 120, s. 5, and a decree thereon may be subject of appeal to this house.

A Scotchman was married in England to an Englishwoman, and then returned to Scotland, where he was domiciled. Some years afterwards, the wife quitted Scotland, and returned to England, where she lived separate from her husband. He came to England, and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and on that charge prayed for a divorce *a mensâ et thoro*. Judgment was given in her favor. The husband returned to Scotland, where the wife instituted a suit for divorce *a vinculo*. The husband pleaded the proceedings in the Arches Court as a bar to further proceedings in Scotland:—

Held, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this house.

Where a petition to dismiss an appeal for incompetency has been directed by the appeal committee to be argued at the bar of the house, the counsel for the petitioner is entitled to begin.

The petition was dismissed, but the costs were reserved.

THE respondent in this case was the wife of the appellant, and on the 17th of May, 1849, instituted an action of divorce against him in the Court of Session, upon the ground of adultery. She was an Englishwoman, the daughter of Charles Dickinson, Esq., of Farley Hill, in Berkshire, and on the 8th of October, 1838, was married by license, at the church of Swallowfield, in that county, to Mr. Geils, a

¹ 3 House of Lords Cases, 280.

domiciled Scotchman, whose residence was in Dunbartonshire. They went to Scotland directly afterwards, and remained there till 1845, when Mrs. Geils, on account of alleged adultery on the part of her husband, quitted his house and came to England. The summons alleged acts of adultery with certain women, specially named, and prayed for a divorce *a vinculo matrimonii*. Mr. Geils put in defences, in which, besides denying the alleged acts of adultery, he stated that, in October, 1845, Mrs. Geils had instituted a suit against him¹ in the Arches Court of Canterbury, founded upon the same grounds of charge as those now set up in the suit in the Court of Session; and that in April, 1848, that Court of Arches pronounced a sentence of separation *a mensâ et thoro*. He then put in six pleas in law; first, denying the jurisdiction of the Court of Session, as the wife was a native of England, and the marriage had been solemnized in England, and according to the forms of the English Church; secondly, that the suit and decree in the Arches Court were a bar to further proceedings in Scotland; thirdly, that the charges were vague in themselves, and not properly laid; fourthly, that as the alleged acts of adultery took place before August, 1843, with parties, some of whom are now dead, the delay was a bar to the suit; fifthly, that there had been condonation, or, as it is called in the Scotch law, *remissio injuriarum*; and sixthly, that the charges were untrue. On the 16th of November, 1849, Lord Wood, the lord ordinary, repelled the first preliminary defence, reserved the second until satisfactory evidence of the nature of the proceedings in the Arches Court should have been adduced, repelled the third in part, but allowed the remainder to become the subject of proof, and repelled the fourth. The lord ordinary directed that the opinions of English counsel should be taken on the subject of the second preliminary defence, and considering these opinions, he repelled that defence. This interlocutor was appealed against, but was confirmed by a majority of the judges of the first division of the Court of Session, Lord Fullerton being the only dissentient. The present appeal was brought against the lord ordinary's interlocutor, and the judges of the first division affirming it, the question intended to be raised by the appeal was, whether the decree obtained by Mrs. Geils, as a defendant in the Arches Court, for a divorce *a mensâ et thoro*, prevented her from asking as a plaintiff or pursuer in the Scotch courts for a further and more complete remedy.

No leave to appeal had been given by the Court of Session.

Mrs. Geils, instead of putting in an answer to this appeal, presented a petition that it might be dismissed as incompetent. The appeal committee directed that the question of incompetency should be argued in the house by one counsel on a side. That question depended on the construction to be put on several statutory enactments regarding appeals.

¹ This allegation in the plea was not correct in point of fact. The suit in the Arches Court was instituted by the husband (both parties being then in England) for restitution of conjugal rights, and the wife set up the husband's adultery in the form of responsive allegation, and prayed relief thereon.

The 48 Geo. 3, c. 151, s. 15, enacts "that no appeal to the house of lords shall be allowed from interlocutory judgments, but such appeal shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the division of the judges pronouncing such interlocutory judgment, or except in cases where there is a difference of opinion among the judges of the said division." The Scotch Judicature Act, 6 Geo. 4, c. 120, s. 5, enacts, "that it shall be the duty of the lord ordinary, at the first calling of the cause before him, to hear the parties on the dilatory defences, with power to reserve consideration on such dilatory defences as require probation until the peremptory defences shall be pleaded and the record adjusted," and "that the judgment of the lord ordinary on the dilatory defences shall be final, unless the pursuer where the defences have been sustained, and the action dismissed, shall within twenty-one days, on certain conditions therein expressed, appeal to the inner house; "and it shall not be competent to appeal to the house of lords against the interlocutory judgment, where the action is not dismissed, unless express leave be given by the court, reserving the effect of the defence, if an appeal should afterwards be taken in the cause when finally decided."

The petitioner contended that, under these sections of the statutes, this appeal was incompetent, because the defence overruled was a "dilatory defence;" because, by the overruling of it, the action was not dismissed, and because, the action not being dismissed, no express leave to appeal was given.

When the appeal was called on, a discussion arose as to the right to begin.

Anderson, for the husband, contended that he, representing the appellant against the decree of the court below, ought first to be heard.

The *Lord Advocate (Moncrieff)* submitted that a petition to dismiss an appeal made the petitioner the actor, and was in the nature of a preliminary objection, the person taking which ought first to be heard in support of the objection.

The LORD CHANCELLOR decided that, where a petition was presented against the competency of an appeal, and that petition was referred by the appeal committee to the house, the petitioner stood in the situation of an appellant, so far as the petition was concerned, and was entitled to begin.

The *Lord Advocate*, for the petitioner, accordingly began:—

The husband here pleaded a plea, denying the title of the wife to sue in the Scotch courts. That plea was, in the court below, properly treated as constituting a dilatory defence. It is a formal, and not a substantive answer to the action. This, at least, is the rule in the Scotch courts, as is shown by the facts that it was heard and decided before the record was closed, and that, on repelling this plea, the lord

ordinary found the party liable in expenses, which he could not properly do, according to the practice of the courts, on a substantive defence, without hearing all the particulars of the case. If the plea had constituted a peremptory defence, the husband ought to have reclaimed to the inner house not to have the plea sustained, as simply capable of being pleaded, but to have the judgment reversed, and the case sent back to the lord ordinary. The husband, is, therefore, bound by what occurred in the court below. The case of *Laidlow v. Dunlop*, 9 Shaw & Dunlop, 579 is in point here. In that case an action was brought to compel a copartnery account; and the fifth plea in law was, that, under the deed of partnership, all disputes between the partners were to be submitted to the arbitration of Mr. Cunninghame, advocate (afterwards Lord Cunninghame.) The court held, that that plea, being one in bar of that action, constituted a preliminary defence, and not having been discussed before the record was closed, the court could not afterwards receive it. The statute, therefore, applies here, and no leave to appeal having been granted, the decision of the court below is final.

Anderson, for the husband. Nothing has occurred in the court below to deprive the appellant of his right of appeal. The plea here was a substantive answer to the action. The distinction between dilatory and peremptory defences is well taken in Balfour's Practicks, p. 343, c. 1, where it is said, "There are two kinds of exceptions or defences; for some are dilatory and some are peremptory. Dilatory, prolong and delay the action or claim to a certain time, and therefore are temporal, and should be propounded before *litis contentatio*; whereof some are declinatory of the judgment, as exceptions of the incompetency of the judge, or of *litis pendentis*; and others are properly called dilatory, as when any man craves his debt before the time. Peremptory exceptions are perpetual, because they stay allutterlie [entirely,] and forever cut away the action or claim, and resist and stop the same at all times; as exceptions of payment, sentence, oath, transaction,¹ prescription, and others." To the same effect is Lord Stair; (Institutions, Appendix to bk. 4, tit. 39, s. 13, p. 792) but mentioning, among the dilatory defences, an objection to the competency of the process, irrelevancy, he adds, that such a defence "hath the effect of a peremptory defence, where the other party hath no other legal means to attain the conclusion proposed;" in other words no other legal means of proceeding. Here, if this defence of competency is sustainable, it will prevent all future proceedings, and it is, therefore, according to Lord Stair's authority, a peremptory defence, and a judgment upon it is consequently a proper subject of appeal. Forbes' Institutes, pt. 4, bk. 1, c. 2, tit. 1; Bankton, bk. 4, tit. 25, s. 2, 4 and 5. The latter authority describes a peremptory defence as that which, "if true, puts an end to the cause,—*perimit causam*." Such is its effect here,

¹ Agreement for the settlement of controverted claims. Bell, Dict. *voce* Transaction.

and therefore it falls under Erskine's definition, (Institutes, bk. 4, tit. 1, s. 66; see also Principles, bk. 4, tit. 1, s. 39,) of peremptory defences, among which he expressly includes the plea "that the question hath already received a final decision," namely, those which, "*perimere causam*, put an end to or exhaust the cause; for they not only free the defender from *instantia* or *lis pendens*, but totally extinguish the pursuer's right of action upon that claim." This definition has been adopted in Bell's Dictionary of the Law of Scotland, *Voce* Defences; Russell's Forms of Process, p. 53; Darling's Practice, pt. 3, c. 2, s. 2, vol. 1, p. 198; and Shand's Practice, vol. 1, p. 317. This house has acted on the principle of treating a defence like this as a substantive, and not as a mere dilatory defence, in the case of *Warrender v. Warrender*, (see Lord's Journals, for 1834, pp. 833, 945; 2 Cl. & F. 448); because, although preliminary in form, it went altogether to bar the right of action. *Gordon v. Clyne*, 1 McLean & Robinson, 72, is to the same effect, and there an appeal was held competent without leave of the court.

The *Lord Advocate*, in reply. This plea has either been treated as a preliminary defence, and then the appellant is not entitled to be heard at all, or as a peremptory defence, and then he has no right to be heard till the record here is complete.

[The LORD CHANCELLOR. The section uses the word "dilatory," not "preliminary."]

For this purpose the words are identical. The case of *Warrender v. Warrender* does not apply to the present, for there the defender set up a personal right of exemption from the jurisdiction of the Scotch courts in any form whatever, or at any time whatever. Nor is the case of *Gordon v. Clyne* applicable, for there the judgment was given on a closed record. Here the appeal is bad in form if the defence is peremptory, for then the case ought to be sent back to the court in Scotland to pass through a different process. It was decided there before the record was closed, and it does not put an end to any right of action, but merely determines that that which has now been adopted is not competent. If so, it is a mere decision on the form of proceeding—it was so treated by all parties in the court below;—it cannot be said *perimere causam*, and consequently, even under the authority of the text writers quoted on the other side, cannot be treated as a subject of appeal to this house.

The LORD CHANCELLOR. My lords, this case has come before your lordships by a reference from the appeal committee. It appears that the respondent to an appeal which had been brought to your lordships' house, presented a petition against the reception of this appeal, alleging that it was incompetent to the party who had brought it.

That petition, praying your lordships to dismiss the appeal as incompetent, stated as the ground, "Because the interlocutors appealed from are interlocutors repelling a preliminary or dilatory defence, and against such interlocutor no appeal to the house of lords is competent

unless with express leave of the Court of Session, which leave has in this instance been refused." That was the ground on which the party prayed your lordships to hold the appeal to be incompetent, and that of course was the ground on which the party (the respondent) in that latter petition came to answer it.

This question arises upon the statute of the 6 Geo. 4, c. 120. Your lordships have heard during the argument, what is provided for by the 5th section of that statute.

[His lordship read the section.]

That section, as your lordship observes, deals entirely with dilatory defences, and the ground upon which this appeal is asked to be deemed incompetent by your lordships is, that under that section so dealing with dilatory defences, the plea here put upon the record must be deemed a dilatory plea, and that it was not competent to the party so pleading to appeal without the leave of the court, and that the court in this instance, although it was asked, gave no such leave.

It becomes therefore necessary, in order to decide on the petition, to consider whether the case does fall within the section to which I have referred; in other words, whether the plea, the second defence in this case, is to be deemed a dilatory defence, or whether it is entitled to be considered as what is described as a peremptory defence. Was it a defence which tended to delay the pursuer, and which presented no substantial answer to the case, nor offered any defence to the justice or law of the claim, supposing it to be properly prosecuted?

Your lordships have been referred to various text books on that subject. I own it does not appear to me that there is any difference in the authorities on that subject, nor does it appear to me that there is any difficulty in coming to a satisfactory conclusion as to what is entitled to be considered as a peremptory plea or defence. The distinction is well known in England, and it is also as well known in Scotland, and is dealt with frequently in both countries. There are various rules applicable to pleas of those two classes, each of those two classes differing from the other, and it can excite no surprise that the proceeding should be more strict and should be more prompt, where a defendant does not defend himself against the claim or right which is set up on the part of the plaintiff or pursuer, but where he merely answers the form of the proceeding, leaving the pursuer or plaintiff, therefore, without any answer whatever to the justice or to the law of the claim.

Looking at the authorities which have been cited,—and I am inclined to think that all the authorities have been cited,—which were calculated to afford your lordships any light or information;—it appears to me that, although there are some words to be found in certain of the passages read which admit of two senses, yet that where the words have been used by the author in the same sense, the same conclusions have followed.

I apprehend that there is really no difficulty in determining what is to be considered as a dilatory defence, and what is to be considered as a peremptory defence. That defence which gives no answer to the

plaintiff's claim, but which merely points out some irregularity or some circumstance which may well consist with the plaintiff's claim being in point of law perfectly undoubted, which offers no answer to it and in that respect leaves it perfectly untouched, so that the plaintiff may, by instituting a suit in some other form or at some other time, be well entitled to maintain it, such a defence I conceive to be dilatory. But I can in no sense understand the word "dilatory" to apply to a plea which leaves nothing to be decided in the case in which that plea or defence is urged, and which leaves the pursuer no case on which to go at any other time to any other court or tribunal, or to adopt any proceeding in any other form. That defence which says, not that you are not entitled to redress in this particular instance, in this particular suit, or in this peculiar form of proceeding, but that you have no case which entitles you in any form to redress, I consider to be peremptory, and not intended to be comprised within the class of dilatory defences.

Now what is the plea or defence in the present case? It is, even if that you, the pursuer, have sustained the wrong of which you complain, you have prosecuted for that wrong, and have obtained the full redress to which that wrong entitles you. You had the option of coming to this court; if you had thought fit—you had time to do so; but when you were sued in England, by process, for a restitution of conjugal rights, you did not content yourself with merely answering that case, saying that the conduct of the husband who claimed restitution of the conjugal rights had been such as to forfeit his claim to that restitution, but you on your part claimed certain relief in respect of the injury you had sustained. You must be taken to have been aware of the extent of that relief, which you claimed; and that relief, to the extent which you claimed and which you were entitled to claim, was afforded you to the full. You have therefore made your election, and have obtained a judgment which pronounced a divorce, *a mensa et thoro*, between you and your husband. This is a suit instituted for the same cause, and your ground is merely that the judgment which you have obtained did not give you such an extensive relief as you might have obtained if you had prosecuted your case in this court.

No doubt in England marriage is indissoluble except by act of parliament; but the law in Scotland is otherwise. But it seems to me that if in England, as would be the case in Scotland, proceedings are instituted in respect of a particular injury, or if in the course of a suit instituted for a different purpose than that of obtaining redress for any such injury, the party who has sustained the injury sets it up in that form not merely with a view of repelling the object of the suit, but for the purpose of obtaining substantial benefit and relief, such as might have been the subject of a distinct and independent suit by the party so setting it up, such a case must be considered as resting precisely on the same ground as if the proceeding itself had been instituted by that party, and that though he is in form the defendant, he would be in the same situation as a plaintiff suing for and obtaining the same relief would be.

I consider, therefore, that, first of all, this defence is put in, is pleaded, and is offered as an entire answer to the case made on the part of the pursuer. It does not follow that, in point of law, it will be an answer, but it is pleaded with the intention of contending and of arguing that it is an entire answer to all claim on the part of the pursuer; and the question before this house now is, not, whether the party is correct in supposing that the plea does disclose a full and effectual answer to the pursuer's claim; but if it is so offered, and if being so offered, it can be considered as falling within the description of a dilatory plea, it strikes me that there is no ground for that conclusion.

The learned counsel, with a candor for which I think the house is indebted to him, declined to argue whether this was a dilatory or a peremptory plea, but sought rather to relieve himself and the house from a question on which no reasonable doubt could be entertained, by setting up another ground on which to entitle the party to the benefit of the petition; namely, that the parties have so treated it, and have so dealt with it in the court in Scotland. But, my lords, that was not the ground on which the petition was presented. The petition was presented simply and solely, and the reason and ground urged in its support was the character of that plea or defence, that it was what is here called a preliminary or dilatory defence, using the words "preliminary and dilatory" as synonymous. I do not think that the act of parliament intended that those words should at all be considered as having the same sense.

My lords, it was suggested before the committee, that, by the course of proceeding below, the party might have prejudiced the objection; but the committee did not think it right to trouble the house on that part of the argument, and desired only that the case should be argued before your lordships on the character of that defence or plea; whether it was to be considered as a dilatory plea, and whether, therefore, the appeal was taken away without the leave of the court, under the 5th section of 6 Geo. 4, c. 120. I consider the question before your lordships to be, whether or not, under the 5th section of the statute, to which I have referred, this is to be considered as a dilatory defence, the decision on which, therefore, could not be the subject of appeal without the leave of the court. I humbly submit to your lordships that this is not a dilatory defence; that it is not within that section, and that it is competent to the party to present his appeal to this house. Upon the hearing of that appeal, of necessity, much of what has been urged before your lordships to-day will have to be considered. On the present occasion, I shall advise your lordships that the petition praying that the appeal may be dismissed as incompetent, ought itself to be dismissed, and I move your lordships that that petition be dismissed accordingly.¹

¹ See *Fleming v. Newton*, 1 H. L. Cas. 363, where it was held that an interdict, though in form *ad interim* only, must be treated as a formal judgment, and may be the subject of appeal to this house.

Capper v. The Earl of Lindsey.

Anderson. I hope your lordships will give us the costs of this hearing.

The LORD CHANCELLOR. They must be reserved.

Respondent's petition dismissed, and the costs reserved until the hearing of the appeal.



CAPPER & others, Plaintiffs in Error, v. THE EARL OF LINDSEY,
Defendant in Error.¹

February 20 and 24, and June 2, 1851.

Railway Agreement — Notice.

A, a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that, if the bill of these projectors should not be passed within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A declared in covenant against these projectors on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law; that at the end of six months they had given notice to put an end to the agreement, and that they had not taken the plaintiff's land:

Held, that this plea was no answer to the action.

THIS was a writ of error on a judgment of the Court of Exchequer Chamber in an action of covenant. The declaration stated that on the 16th of March, 1846, an agreement, indented, had been made between the plaintiff and the defendants, which recited that the plaintiff was possessed of certain lands in the county of Lincoln; that the defendants being the members of a projected company, had given notice of an intention to apply to parliament for a bill to enable them to construct a railway from London to York, to be called "The Direct Northern Railway;" that the line of such railway would pass close to the plaintiff's mansion and through other portions of his estate, and that he had given notice of his intention to oppose the said bill; that another projected company had likewise given notice of an intention to apply to parliament for a bill to make a railway, with certain branches, from London to York, to be called "The Great Northern Railway;" that the plaintiff, as a landowner, had agreed with the defendants to withdraw his opposition to the Direct North-

ern Railway, and to use his best endeavors to oppose the bill for the Great Northern Railway; in consideration of which promises the defendants agreed that, in case the bill for the Direct Northern Railway should, within six calendar months from the date of the agreement, pass into a law, they would pay the plaintiff 25,000*l.*, in compensation for the permanent injury to be occasioned to the mansion of the plaintiff and his estate by the said railway, namely, 20,000*l.* within three months, and the remaining 5,000*l.* within three years after the passing of the bill, provided that within the latter period they did not obtain a bill to make certain deviations required by the plaintiff. Many other covenants were then added, and the agreement went on thus:—that in case the bill for the Great Northern Railway should, within eighteen months from the date of the agreement, pass into a law, the Direct Northern Railway Company should, within three months after the passing of the said bill, and whether any deviation in the intended line of the proposed railway should be made or not, pay to the plaintiffs the sums following: if the railway should be made with a branch from Stamford, 15,000*l.*; if without such branch, 5,000*l.*; in full compensation, &c. That in the event of the last mentioned bill passing into a law, the plaintiff should use his best endeavors to obtain from the Great Northern Company the largest sum as compensation, and should pay over the same to the Direct Northern Company. Provided that, if no act of parliament in favor of the Direct Northern Railway Company should be passed within six calendar months from the date of this agreement, it should be lawful for the plaintiff, and also for the defendants, or either of them, at any time thereafter to put an end to the agreement by written notice; and on giving such notice, everything in the agreement therein contained (except some provisions as to costs,) should be “absolutely null and void, to all intents and purposes whatsoever, as fully as if these presents had never been executed.” And lastly, that in case an amalgamation should be made of the said intended companies, then the amalgamated companies should, within three calendar months next after the same should have been established by an act of the legislature, and without reference to any alteration or deviation in the line, pay unto the plaintiff in full, &c., if the railway of the amalgamated companies should follow the line of the intended Direct Northern Railway, 25,000*l.*, subject to the same conditions as before; if it followed the intended line of the Great Northern Railway, with a branch to Stamford, 19,000*l.*, or without such branch, 6,000*l.* The declaration then alleged that, whilst the agreement remained in force, namely, on the 26th of June, 1846, the amalgamation of the two companies took place, and was established by an act of the legislature; that the railway followed the line of the Great Northern Railway, without the branch to Stamford; whereupon the plaintiff claimed the sum of 6,000*l.* under the agreement.

The defendants pleaded that no act of parliament was made in favor of the Direct Northern Railway Company within six months of the date of the agreement, and that they did, on the 23d of No-

ember, 1846, according to the provisions in the agreement, give the plaintiff a notice in writing to put an end to the agreement, at which time no part of the line of railway had been made on the estate of the plaintiff, nor had his lands been taken by the amalgamated companies.

There was a general demurrer to this plea, and the defendants joined in demurrer.

The case was argued in the Court of Exchequer before Barons Alderson, Rolfe, and Platt, who held the plea to be an answer to the action, and judgment was given for the defendants. 1 Exch. Rep. 579. The case was taken to the Exchequer Chamber, and there argued before Justices Patteson, Coleridge, Coltman, Maule, Williams, Cresswell, and Erle, by whom the judgment of the Court of Exchequer was reversed. 2 Exch. Rep. 801. The present writ of error was then brought to this house.

The judges were summoned, and Mr. Baron Parke, Mr. Justice Patteson, Mr. Justice Maule, Mr. Justice Coleridge, Mr. Justice Erle, Mr. Justice Williams, Mr. Justice Talfourd, and Mr. Baron Martin, attended the house.

Kelly and Stuart Wortley (*Phipson* was with them,) for the plaintiffs in error:

The question here relates to the construction of a clause in an agreement, and to the effect which that clause is to produce on the happening of a certain event. That event was the passing, within a limited period, of an act to authorize the Direct Northern Railway Company to make a railway from London to York. That act has not passed. On the determination of that event, the defendants had a right to put an end to the agreement, by giving notice. They did give the notice; after the giving of which, according to the terms of that agreement itself, the agreement was to become null and void. Yet it is contended that that agreement still subsists. The argument for its continued subsistence depends on a particular exception contained in a proviso; but that proviso is itself disposed of by the effect of the notice, which operated as a general termination of the agreement. In the Court of Exchequer, one of the learned barons asked whether there was anything stated as to the length of time which might elapse before the earl's right to make this demand was finally extinguished. There is no way to get rid of the difficulty suggested by that question. If, within some months after the agreement had been put an end to, the additional clause now sued on could be enforced, because there had been an amalgamation of the two companies, it could be enforced for some years, or for any number of years; for there is no limit to the period within which the amalgamation of the companies might not revive the dead agreement.

In the Court of Exchequer Chamber, the arrangement of the provisos in the deed was relied on; but surely, if a man makes three distinct and independent covenants, and an action is brought for the breach of any one of them, it cannot matter in what arrangement they are placed, provided the deed which contains them is at an end.

The covenant alleged to be broken may be a separate and independent covenant; but if the whole deed is put an end to by the notice, the right to give which is expressly reserved, no one covenant in it, whether independent or not, can continue to subsist, and the part of the agreement where this right to give the notice is reserved cannot be a matter of importance. The language of the deed clearly shows that, in the event of a notice being given after the bill for the Direct Northern Railway has failed to pass, the deed itself becomes void.

J. Turner and J. Bailey, for the defendant in error; the fallacy of the argument on the other side lies in treating this contract as if it was a mere contract for the purchase of lands. It is not so; it is a contract for the purchase of the earl's right, as a land-owner, to oppose the Direct Northern Railway, or to concur with the Direct Northern Company in opposing the scheme of the Great Northern Company. The consideration for the sale of his right is to be found in the covenants contained in the deed. The amount of the money to be paid is to depend on various circumstances. In one set of circumstances a larger, in another a smaller, sum is to be payable. The agreement goes on to suppose that, in spite of the opposition of the Direct Northern Company and of the earl, the bill of the Great Northern Company may pass into a law, in which event a different sum is to become payable; and then comes the supposition that the two companies may be amalgamated. In that event, one of two rates of compensation on the occurrence of one of two states of circumstances is provided for. The provision for the determination of this agreement affects the rights of the parties on the happening of one of the several events mentioned in the agreement, but it does not touch those rights in relation to all of them. It could not; the earl's title to oppose the amalgamated companies remained after all hope of passing the Direct Northern bill had been given up. The contract was one of purchase and sale; but the subject-matter was a right of opposition, or concurrence. By his opposition to the Great Northern, he put the Direct Northern Company in a position to compel an amalgamation. That amalgamation has taken place; the Direct Northern Company has received the benefit of the exercise of this right, and now seeks to avoid paying for it. But to allow it to do so, would be to make the deed a one-sided agreement, which cannot be.

It may be said that it was open for the earl to oppose the bill of the amalgamated company after the agreement was put an end to; but that is not so, for the Direct Northern Company forms part of the amalgamated company, and he had covenanted not to oppose that company, having sold his right to do so for the considerations contained in this agreement.

The whole contents of the agreement justify this construction. Suppose that, on the 17th of March, 1846, the day after the making of the agreement, the two companies had amalgamated, the clause which binds them to pay a certain sum on the happening of that event would have applied. That clause constitutes a present contract to pay. Suppose that three months after that time the act had passed,

establishing the amalgamated company, the money would have become payable to the earl before the 16th of September, 1846. But the right to determine the agreement never could arise till after that time, for no option of that sort is given till "six calendar months from the date of these presents."

The first branch of the agreement relates to the passing of the Direct Northern bill within six months. The power to put an end to the agreement only arises after that branch of the agreement has wholly come to an end. But if so, still, in the second place, the event of the Great Northern bill being passed within eighteen months of the date, is not thereby affected. All these covenants are independent of each other, and the failure of one does not occasion the failure of all. If this proviso had been intended to override all the covenants in the deed, it would have been put after all; instead of which, it is placed only after the first two, leaving the third, which is the one now under consideration, wholly unaffected. It is the reasonable construction of this deed to refer the proviso to the two covenants which depend on the will of the legislature, a matter not to be controlled by the parties, instead of applying it to that matter which depends on the will of the parties as well as of the legislature; for the latter construction would enable the parties to defeat their own contract.

Kelly, in reply. The words in the contract are to be read according to their ordinary and natural signification, unless that mode of reading them gives to them a construction which is contrary to common sense. If so, then the whole agreement comes to an end by the effect of the notice. The provisions relative to the passing of the Great Northern bill, and to the amalgamation, were to take effect if no notice was given; but if the notice was given, then it was intended that that notice should override every thing else, and should completely put an end to the agreement.

The LORD CHANCELLOR, (Lord *Truro*,) moved that the following question should be put to the judges:

"To a declaration in the form set forth in the accompanying paper,¹ would a plea also in the form set forth in such paper be held in the courts of law a sufficient answer?"

The judges requested time to consider the question.

PARKE, B., now delivered the opinion of the judges. In answer to the question proposed by your lordships, I have to state the unanimous opinion of the judges, that the plea in the case supposed would be bad.

In the deed set out in the declaration referred to in the question, it appears that there were two different acts of parliament applied for, for making a railway from London to York, one for a railway to be

¹ The paper handed to the judges contained the declaration and plea set forth at length.

called the Direct Northern, another the Great Northern Railway; and the deed contains a bargain with the plaintiff, who is to petition parliament against and oppose the latter bill, and support the former; and, as a consideration for so doing, the defendants, the provisional directors of the intended Direct Northern Railway, covenant to pay certain sums and give certain benefits to the plaintiff. These benefits vary, and the deed provides for three cases:—

First, the passing of the Direct Northern Railway bill in six calendar months.

Second, the passing of the Great Northern Railway bill before the end of eighteen calendar months.

Third, the amalgamation of the two, and the establishing of the amalgamated companies by act of parliament.

In the first event, 25,000*l.* are to be paid, and many other covenants are to be performed.

In the second, the sums of 15,000*l.* or 5,000*l.* are to be paid, and other stipulations performed.

In the third, 25,000*l.*, or 19,000*l.*, or 6,000*l.* are to be paid according as the line of the amalgamated company should follow the intended line of the Direct Northern, or of the Great Northern, with a particular branch, or without it. And the last contingency is averred in the declaration to have taken place; and the plaintiff seeks to recover the sum of 6,000*l.* stipulated in that event to be paid. The plaintiff's costs were at all events to be paid. It appears from the declaration, that in the deed there is this provision: "Provided always, and it was expressly agreed and declared, that if the act of parliament authorizing the Direct Northern Railway to make the said intended railway from London to York should not be passed within six calendar months from the date of the deed, it should be lawful for the plaintiff, his heirs, and assigns, at any time thereafter, to determine and put an end to the agreement, by a notice; after which notice, that agreement, and any article and thing therein contained (except the proviso and the covenant in relation to the payment of the plaintiff's costs,) should be null and void, to all intents and purposes, as fully as if the agreement had never been executed;" and then follows another proviso in a similar form, allowing the defendants to determine the agreement in the same manner; after which the agreement, and every thing therein contained, except that and the preceding proviso, and the covenants as to the costs, should be absolutely null and void in like manner. Then follows the provision for the case of amalgamation, on which the question depends, "and, lastly," which, referring to the antecedent words, means, "Provided always, and it was thereby expressly agreed and declared lastly," that in case, either by an agreement made between the provisional directors of the said intended Direct Northern Railway Company and of the said intended Great Northern Railway Company, or in consequence of the decision or recommendation of a committee of the house of commons or otherwise, an amalgamation should be made of the said intended companies and railways, then and in such case the said amalgamated companies should, within three calendar

months next after the same should have been established by an act of the legislature, and without reference to any alteration or deviation made, or to be made, of the line of railway, pay one of the sums before mentioned, and then the several covenants and agreements concerning the purchase and taking of additional land, and the resale of land to the plaintiff, the making deviations and maintaining viaducts, and all other covenants on the part of the intended Direct Northern Railway Company, as far as the same should be applicable, should be performed by the amalgamated companies, and should be embodied in a deed to be executed by the amalgamated company."

The plea avers, that no act of parliament, authorizing the said Direct Northern Railway Company to make the said intended railway from London to York, passed within six calendar months from the date of the agreement, and that the defendants did thereupon, on the 23d November, 1846, in pursuance of the proviso, give a notice to determine and put an end to the agreement, and that no part of the plaintiff's said estate had then been taken or used by the amalgamated company, or any injury been then done to it; to which plea there is a demurrer; and the question referred to her majesty's judges is, the sufficiency of the plea.

It is impossible to deny, that the parties meant the defendants to be bound, under some circumstances, to pay the stipulated sums, if an amalgamation should be made of the two companies, and an act passed to effect it, though neither the Direct Northern nor Great Northern Act should pass; for they are to pay, in case an amalgamation should take place by agreement of the provisional directors of the two companies, or by a recommendation of a committee of the house of commons, evidently meaning a committee sitting upon either bill before it passed into a law.

There being therefore clearly a clause creating an obligation to this effect, the question is, whether it was put an end to by a notice under the circumstances stated in the plea?

The question may be considered as if this clause formed a part of the provisos, one or both, or was collateral to them.

If the former be the case, and we think it is, the plea seems to us to be insufficient.

The part of the deed following the words "and lastly" may not be a qualification of the first proviso giving the option to the plaintiff, because there is nothing in the least repugnant or inconsistent in allowing the plaintiff to put an end to the obligation of covenants which are intended to be performed for his benefit, as these are, which are to operate in the case of amalgamation, as well as the others. It is by no means unreasonable that the plaintiff should be allowed, if he cannot get the greatest advantages which he stipulates for, which he contemplated to obtain by the passing of the Direct Northern Company's Act in six months, to get rid of the agreement altogether, and insist on his legal rights independently of contract. But there is much more difficulty in allowing the defendants, provided the Direct Northern bill does not pass, to rid themselves of all liability

to perform covenants which are clearly meant to operate, as these were, though the Direct Northern Act should not pass.

It is not impossible that parties should so stipulate; and in the deed there is clearly a power given to the defendants to determine the covenants as to the Great Northern, though they are unconnected with those relative to the Direct Northern; for if the Direct Northern does not pass in six months, they may determine the obligation to pay, if the Great Northern passes in eighteen. But when we find this, which is a proviso, and placed in juxtaposition with that enabling the defendants to determine the contract, and connected with it, we think we ought to construe it as qualifying the former proviso. And, so construed, the meaning is, that, provided the Direct Northern Act should not pass in six months, the defendants may determine the contract, provided that if the companies are amalgamated, then they shall not, but shall be bound to pay the substituted contingent sums. It is said, however, that this construction is inadmissible, because there is no limit of time within which the amalgamation is to take place, so that the right to determine the contract at the end of six months is to depend on a subsequent event to happen at an indefinite time. It is argued that it would be inconsistent to say that the defendants might determine the contract at the end of six months, yet they should not do so if ten years afterwards another event should occur. And this is a reason for qualifying the defendant's right to some extent, and for holding that the defendants may determine the contract at or after the end of six months, in case this act should not in the mean time pass; but in case an amalgamation should have taken place and been established by act of parliament, whilst the contract remained undetermined, then the covenants depending on amalgamation should be performed. This construction renders the whole intelligible and consistent; and, supposing this to be the true construction of the instrument, the averment in the declaration, that the amalgamation of the companies took place and was established by an act of the legislature whilst the agreement remained in full force, sufficiently shows that it was made before the defendants gave notice to determine.

If, in the second place, these stipulations should not be considered as part of the proviso immediately preceding, but as introduced in a prior or subsequent part of the deeds, it seems to us that the plea is equally bad.

The proviso is, as has been said, perfectly reasonable on the part of the plaintiff. It is unnecessary indeed with respect to all the covenants depending on the Direct Northern Railway Company obtaining the act, because they are already made contingent on the act being obtained in six months; but with respect to those depending on the act for the Great Northern Company passing in eighteen months, the proviso is not unnecessary, but it is by no means unreasonable, for the covenants are for the benefit of the plaintiff; nor would it be inconsistent or unreasonable to allow, as an equivalent to giving the option to the plaintiff, also to give the option to the defendants to determine all their covenants with respect to the Great

Northern, so that the defendants might under their agreement, if the Direct Northern Act did not pass within six months, have freed themselves from the obligation to pay the sums and to perform the covenants on their part dependent on the passing of the Great Northern Company's Act in eighteen calendar months. And this appears to have been permitted by the deed, which is so worded as to allow the option to both parties, as to the covenant with respect to the Great Northern; but then it is clear to us that they must have executed that option before the actual breach of the covenants; for after the covenants have been actually broken by non-payment of sums payable pursuant to them, or non-performance of other covenants, whereby a cause of action actually occurred, as here, it would be unreasonable and inconsistent to allow the defendants a power to discharge themselves by a notice to determine.

It would be as much as to say this, that though the defendants have actually broken their covenants subsisting at the time, and become liable to pay a large sum of money, or large damages, or both, yet they should not be recovered if the defendants chose to give notice to determine the contract.

If, then, the covenants dependent on the amalgamation had been wholly collateral to the proviso, and not a qualification of it, and had been inserted as an independent part of the deed, we think this plea would be bad, because it is not stated, nor does it appear, that the notice was given before the breach of the covenants declared upon for the nonpayment of 6,000*l*. This sum was to be paid in three months after the act passed, and therefore at the end of three months there was a breach. The right to payment does not depend upon the fact of making a part of the railway by the amalgamated company on the plaintiff's estate, or taking, or using, or doing any injury to the plaintiff's land; the right to it depends simply on the effluxion of three months' time after the Amalgamation Act. No doubt no averment could have been made on the plea to obviate the last objection, as the notice was probably not given till the 23d November, and the Amalgamation Act passed in June.

We are therefore of opinion that, whether we consider the clause in question as a proviso qualifying the preceding proviso, or as a collateral proviso or covenant, the plea is bad.

The LORD CHANCELLOR said that their lordships were much indebted to the learned judges for the assistance which they had rendered in this case. He moved that their opinion should be printed.

LORD BROUGHAM thought that, after the able opinion of the judges, with which he entirely agreed, the house could entertain no doubt upon the subject, and he should therefore move that judgment be given for the defendant in error.

The LORD CHANCELLOR concurred with his noble and learned friend.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER;

DURING THE YEAR 1852.

LOWE v. THE LONDON AND NORTHWESTERN RAILWAY COMPANY.¹

May 26 and 27, 1852.

*Use and Occupation—Corporation, Liability of—Implied Contract—
8 Vict. c. 16, s. 97—Power of Directors to Contract by Parol.*

Where a corporation have actually used and occupied land for the purpose of their incorporation, by the permission of the owner, *semble*, that they are liable to be sued in *assumpsit* for use and occupation, notwithstanding they have not entered into a contract under their common seal.

But in the case of a railway company, sued under the above circumstances, where the 8 Vict. c. 16, s. 97, (the Companies Clauses Consolidation Act), provides that any contract, which, if made between private persons, would be valid, although made by parol only, may be made by parol on behalf of the company by the directors, and shall be binding on the company:—

Held, that such a contract might be presumed to have been entered into, and that the company was, therefore, liable to the action.

ASSUMPSIT for use and occupation. Plea, *non assumpsit*.

At the trial, before Jervis, C. J., at the Derbyshire Spring Assizes, 1852, it appeared that this action was brought by the plaintiff, who was the owner of a strip of land adjoining a branch line of railway in the course of construction by the defendants, in respect of its tempo-

¹ 21 Law J. Rep. (N. S.) Q. B. 361.

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rary occupation during four or five years by the contractors, who had laid bricks and materials upon the land, and had erected upon it dwellings for the workmen. No contract under seal by the defendants, or by two of the directors of the company, under the 8 Vict. c. 16, s. 97, had ever been entered into. The learned chief justice left it to the jury to say upon the evidence, whether there had been, in fact, any occupation by the defendants, by means of their agent; and the jury returned a verdict for the plaintiff, with 175*l.* damages. Leave was reserved to the defendants to move to enter a nonsuit upon an objection taken at the trial, that the action could not, under the circumstances, be supported against the defendants. A rule *nisi* upon the leave reserved, and also for a new trial, on the ground that the verdict was against the evidence, having been obtained —

Miller, Serj. and Hayes now showed cause. First, assuming that the evidence proves an occupation by the company, the objection upon which a nonsuit is sought to be entered is, that the defendants, being a corporation, are not bound in the absence of a contract under their common seal. But that rule applies only to cases of express contract, and not, as here, where a contract is implied by the law from certain acts done and permitted to be done. A corporation can only speak by its common seal; but here the law speaks for it. It is like the cases which occur under the Statute of Frauds. A party cannot expressly bind himself to pay the debt of another except in writing; but he is impliedly bound to pay his own debt without any writing. So, if a lease for years be made to a corporation, they cannot make an actual surrender, except by deed under their seal; but if they accept a new lease, this is a surrender in law of their first lease, and good, though not under seal. *Bac. Abr.* 'Corporations,' E. pl. 3. A corporation may sue, as plaintiffs, in assumpsit for use and occupation, where the premises have been used and occupied by their permission. *The Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466; *The Mayor, &c., of Stafford v. Till*, 4 Bing. 75; s. c. 5 Law J. Rep. C. P. 77; *Southwark Bridge Company v. Sills*, 2 Car. & P. 371. If so, there must be a corresponding obligation cast upon them, and they must be capable of being sued in assumpsit, where they have actually used and occupied land by the permission of its owner. There is, indeed, more difficulty in saying that a corporation can permit an occupation without seal, than there is in saying that they can be permitted to occupy. The 11 Geo. 2, c. 19, s. 14, which enables landlords, where the agreement is not by deed, to recover satisfaction for the use of the lands, makes no exception of bodies corporate. *Elliott v. Rogers*, 4 Esp. 59. It is a fallacy to treat this action as founded on any contract; it is brought to recover a compensation for an actual enjoyment, and the law implies a consequent liability. *The Mayor, &c. of Carmarthen v. Lewis*, 6 Car. & P. 608; *Painter v. The Liverpool Gas Co.*, 3 Ad. & E. 433; s. c. 5 Law J. Rep. (N. S.) M. C. 108; *Church v. The Imperial Gaslight and Coke Co.*, *Ibid.* 846; s. c. 7 Law J. Rep. (N. S.) Q. B. 118; *Hall v. The Mayor, &c. of Swansea*, 5 Q. B. Rep. 526; s. c. 13 Law J. Rep. (N. S.) Q. B. 107; *Doe d. Pennington*

v. *Taniere*, 12 Ibid. 998; s. c. 18 Law J. Rep. (N. S.) Q. B. 49, are all cases where a liability has been implied by law in the absence of a contract under seal.

[LORD CAMPBELL, C. J. If any promise is implied, must it not be a promise under seal?]

The defendants might have been bound by a simple contract made by two of their directors, under the 8 Vict. c. 16, s. 97. It is, therefore, unnecessary to presume a deed sealed by the corporation, and so the difficulty felt in *The Copper Miners Company v. Fox*, 20 Law J. Rep. (N. S.) Q. B. 174; s. c. 3 Eng. Rep. 420, does not arise. In *Finlay v. The Bristol and Exeter Railway Company*, 21 Law J. Rep. (N. S.) Exch. 117; s. c. 9 Eng. Rep. 489, it was admitted that a corporation is liable in use and occupation for the period during which they have actually occupied. Parke, B., there said, "If the defendants had been private individuals they might have made a parol contract to hold for a year as tenants for a year, and their conduct in continuing in possession after the expiration of the year would be evidence of a contract for another tenancy from year to year. That presumption would arise from the conduct of the parties." That observation is strictly in point here; and assuming that there has been an actual occupation by the defendants, with the permission of the plaintiff, this action will lie. [They then argued that there was sufficient evidence of an actual occupation by the defendants.]

Meller and Macauley, in support of the rule. The general rule of law is, that a corporation aggregate can only contract under seal, subject to a single exception arising from necessity; and it lies on the plaintiff to bring his case within that exception.

[LORD CAMPBELL, C. J. In *Hall v. Mayor, &c. of Swansea*, there was no necessity to contract without seal.]

That is a peculiar case; there was no promise there, but it was presumed that the defendants had engaged to repay money which they had obtained wrongly. *Arnold v. The Mayor, &c. of Poole*, 4 Man. & G. 860; s. c. 12 Law J. Rep. (N. S.) C. P. 97; and *Paine v. The Guardians of the Strand Union*, 8 Q. B. Rep. 326; s. c. 15 Law J. Rep. (N. S.) M. C. 89, lay down a clear rule of law.

[CROMPTON, J. referred to *Sanders v. St. Neots Union*, 8 Ibid. 810; s. c. 15 Law J. Rep. (N. S.) M. C. 104.]

That case is explained in *Lamprell v. The Billericay Union*, 3 Exch. Rep. 283; s. c. 18 Law J. Rep. (N. S.) Exch. 282, which lays down the true rule, namely, that none can be bound by an implied parol contract except those who are capable of contracting by parol. Here, the defendants being a corporation, are incapable of contracting otherwise than by their common seal.

[COLERIDGE, J. That is not so; they may contract by two directors.]

ERLE, J. Use and occupation does not rest upon a promise inferred by the jury, but upon a statutory liability arising out of the occupation.]

Birch v. Wright, 1 Term Rep. 378, lays down the principle on which

the action is founded. *Beverly v. the Lincoln Gaslight and Coke Company*, 6 Ad. & E. 829; s. c. 7 Law J. Rep. (N. S.) Q. B. 113, proceeded on its being a contract. It is said on the other side that a contract may be here implied, and cases are referred to where the consideration for the promise had been had by a corporation, and they were held impliedly liable. But here the enjoyment of land is the consideration, and a corporation has no capacity to take land except under seal; the law will only, therefore, presume that they have so held it, and assumpsit will not lie — *Diggle v. the London and Blackwall Railway Company*, 5 Exch. Rep. 442; s. c. 19 Law J. Rep. (N. S.) Exch. 308; *Homersham v. the Wolverhampton Waterworks Company*, 6 Exch. Rep. 137; s. c. 4 Eng. Rep. 426; *The Mayor, &c. of Ludlow v. Charlton*, 6 Mee. & W. 815; s. c. 10 Law J. Rep. (N. S.) Exch. 75.

[LORD CAMPBELL, C. J. In those cases the liability arose on an express preceding contract which had been executed; here it arises from the fact of occupation, and the law raises the promise. That is what is expressly laid down in *Finlay v. the Bristol and Exeter Railway Company*.]

The dictum of Parke, B., in that case was extra-judicial; the court decided that the action would not lie.

[LORD CAMPBELL, C. J. But that dictum is quite in accordance with *Hall v. the Mayor, &c. of Swansea*. Where you proceed for a breach of an executory contract, you must rest on the contract itself; but where the consideration has been executed, you proceed on the promise implied by law.]

In *Church v. the Imperial Gaslight Company* it was laid down that there is no difference in this respect between executed and executory contracts. The law will only imply such a promise when there is a capacity to contract. *Lamprell v. the Billericay Union* shows that the law will not infer a promise by a corporation wherever there has been a consideration executed in their favor.

[LORD CAMPBELL, C. J. That case certainly goes to the length that a corporation cannot be sued in assumpsit, although work has been done for them, and the benefit has been enjoyed, and the matters are within the scope and object of the corporation. It must be considered as dissenting from *Sanders v. St. Neots Union*.]

As to the power to contract by parol, under 8 Vict. c. 16, s. 97, no such contract will be presumed — *Cope v. Thames Haven Dock and Railway Company*, 3 Exch. Rep. 841; s. c. 18 Law J. Rep. (N. S.) 3 Exch. 345; and *Ridley v. the Plymouth, &c. Grinding and Baking Company*, 2 Ibid. 711; s. c. 17 Law J. Rep. (N. S.) Exch. 252.

[They also argued that the verdict was against the evidence.]

LORD CAMPBELL, C. J. I am of opinion that the rule to enter a nonsuit ought to be discharged. The objection is a technical one, upon which the defendants were at liberty to rely, but I think it does not afford a defence to the action. The objection is, that this action of assumpsit for use and occupation cannot be maintained, because the defendants, being a corporation, can only bind themselves under their common seal. We must assume, upon this part of the case,

that the defendants have enjoyed and occupied the land in question with the consent and permission of the plaintiff. That being so, upon the authority of *The Dean and Chapter of Rochester v. Pierce*, which I am not at all prepared to overturn, I think that an action is maintainable against them for use and occupation. That case decides that such an action may be maintained by a corporation, where the land has been occupied by their permission; and I think the liability must be reciprocal, so as to charge them in a like case. But it does not rest upon that authority alone. We have also the decision of this court in *Hall v. the Mayor, &c. of Swansea*, where it was held that a corporation may be sued in *indebitatus assumpsit* for fees of an office wrongfully received by them. It is, indeed, said that that was a case of necessity; but there was no more necessity there than that arising out of the moral obligation of the corporation to pay its debts, and the same reasoning applies here. In addition to these authorities, we must pay great respect to what fell from my brother Parke in *Finlay v. the Bristol and Exeter Railway Company*. He there says, that an action will lie against a corporation for the actual use and occupation of land, with the consent of the owner. But independently of any general principle of law applicable to corporations, I think we are relieved of any doubt in this case by the Companies Clauses Consolidation Act, section 97, which gives power to the directors to enter into a contract such as this for the occupation of land necessary for carrying out the undertaking to complete the railway. Now, supposing the company to have had the occupation and enjoyment of the land, why are we to assume that there was no such parcel contract on the part of the directors, and that not to have taken place which would have explained all that we have to solve? There is no negative evidence to show that there was no such contract, and it may be presumed that there was; and, if so, then the action clearly lies. As to the other question in this case, I do not think we should be justified in disturbing a second verdict, unless it was clearly without any evidence to support it. We might with equal reason be asked to set aside a third verdict, and so *toties quoties*.

COLERIDGE, J. As to the first point, it must be taken to be found, that there was a use and occupation of this land by the defendants, with the permission of the plaintiff. In the case of an ordinary individual, the law infers a promise to pay a reasonable compensation in such a case, and there is authority for such an action being sustainable in respect of a corporation; and I do not think the courts ought now to limit the extent of that authority. But in this case, we are not driven to come to a decision on that point, because an inference may be drawn sufficient to support the action under the provision in the Companies Clauses Consolidation Act, to which attention has been directed. If there exists no legal impossibility which prevents a corporation from making a promise, we ought to draw the same inference as we should draw in the case of an individual; and here it appears that the directors of the company were at liberty to enter into a contract of this nature. Therefore, taking it either way, and without any

Lowndes v. The Earl of Stamford and Warrington.

particular reference to the authorities quoted, I think this action is maintainable.

ERLE, J. I am of the same opinion. Two questions here arise : first, whether, evidence of actual occupation by the defendants is evidence to go to the jury in support of an action like this : and I think it is. I do not propose to advert to the decisions, which appear to me in some degree to conflict, as to whether an action like this will lie against a corporation, without proof of a contract under seal. But there is the opinion of the Court of Exchequer (in which court the exemption of corporations has been most strictly maintained), that an action of assumpsit, for use and occupation, will lie where there has been an actual occupation by a corporation. I also think that the action is maintainable by reason of the Companies Clauses Consolidation Act, whereby it is provided that the directors may exercise such a power as this on behalf of the company, and that, with respect to any contract which, if made between private persons, would be valid by parol, the directors may make a valid contract by parol. In the ordinary case of land held by one person with the consent of another, we can infer a contract on the part of the person occupying ; and if we can do so in the case of a single occupation, I do not see why we may not do so where several persons occupy. I think, therefore, that the point of law fails the defendants. As to the other question, whatever may be the correct view of the balance of the evidence on both sides, I think that, after the finding of two juries, and no imputation of any misconduct whatever, we are not justified in setting the verdict aside, and sending the case for another trial.

CROMPTON, J. concurred.

Rule discharged.

LOWNDES v. THE EARL OF STAMFORD AND WARRINGTON.¹

May 6, 1852.

Apportionment—Salary for Services—4 & 5 Will. 4, c. 22—Deed, Construction of—Condition Precedent—Pleading—Declaration.

Where the plaintiff was by deed appointed to "the offices of auditor and superintending manager of the defendant's estates" at a salary of 1,800*l.*, payable half-yearly, on the 7th of July and the 7th of January in every year, and the defendant had revoked the appointment in the middle of a current year:—

Held, that the 4 & 5 Will. 4, c. 22, s. 2, did not enable the plaintiff to recover a proportionate part of the salary in respect of that portion of the year during which the plaintiff held the offices.

That statute applies to cases where payment for the whole period must be made to some

¹ 21 Law J. Rep. (N. S.) Q. B. 371; 16 Jur. 903.

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person, and does not include a payment under a contract between employer and employed for services performed, where the payment entirely ceases upon the determination of the claimant's right to receive it.

The defendant by deed appointed the plaintiff auditor of his estates at a yearly salary, and in consideration thereof the plaintiff covenanted to give up his practice as a barrister, if required so to do, and not to accept any other office or employment whatever, so long as he should hold the said office. The defendant also covenanted to pay the plaintiff the said salary during so long as he should hold the office; and in case the defendant should revoke the appointment without adequate and just cause (to be determined as hereinafter mentioned), that the defendant should pay him a retiring pension of 1,000*l.* a year; and it was provided that the adequacy and justice of the cause of any revocation by the defendant of the said appointment should be determined by J. W.

Held, that the defendant had no power of dismissing the plaintiff without giving him a right to the pension of 1,000*l.* a year, until he, the defendant, had previously ascertained by a reference to J. W. that he had adequate and just cause to revoke the appointment.

Held, also, that the jurisdiction of the court to enforce payment of the retiring pension was not ousted; and that the plaintiff might declare for it without showing that there had been any determination by J. W. or any excuse for his not having obtained such determination, or that a reasonable time for obtaining such determination had elapsed.

COVENANT. The first count of the declaration stated that, by a certain indenture made between the defendant of the one part and the plaintiff of the other part, the defendant appointed the plaintiff to be auditor and superintending manager of all his the defendant's estates, and the defendant thereby covenanted with the plaintiff that he, the defendant, would, so long as the plaintiff should hold the said offices, pay him the annual salary of 1,800*l.* by equal half-yearly payments, on the 7th of July and the 7th of January in every year; and further, that, in case the defendant should revoke the said appointment thereby made, without adequate and just cause, then and in such case, from and after such revocation, he, the defendant, would, during the remainder of the joint lives of himself and the plaintiff, pay to the plaintiff a clear annual sum of 1,000*l.* by equal half-yearly payments, on the said half-yearly days thereinbefore mentioned. That although from the time of making the said indenture hitherto, the plaintiff had duly performed and fulfilled all things therein on his part to be performed and fulfilled, and had, to wit, during all the time last aforesaid, continued to hold the said offices of auditor and superintending manager to which he was thereby appointed as aforesaid, and although a large sum of money, to wit, the sum of 900*l.* for the period of time between the 7th of January, 1850, and the 7th of July, 1850, during which the plaintiff held the said offices of auditor and superintending manager to which he was so appointed as aforesaid, became and was under and by virtue of the said covenant in that behalf due from and payable by the defendant to the plaintiff, yet that the defendant had not paid the said sum or any part thereof.

The second count stated the making of the said indenture to the effect in the first count mentioned, and alleged that, although the plaintiff from the time of the making thereof continued to hold the said offices of auditor and superintending manager of the said estates of the defendant, to which he was by the same indenture so appointed as aforesaid, until and upon a certain day which elapsed between the 7th of January and the 7th of July, 1850, to wit, on the 27th of May, 1850, on which day the defendant without adequate and just cause

in that behalf revoked the said appointment of the plaintiff so made by the said indenture as aforesaid, and although after such revocation, to wit, on &c., a large sum of money, to wit, the sum of 500*l.*, being the first payment of the said clear annual sum of 1,000*l.*, became and was due from the defendant to the plaintiff under and by virtue of the said covenant in that behalf in the said indenture contained, and although the defendant had from the time of the said revocation ceased to pay, and had not paid to the plaintiff the said salary of 1,800*l.*, or any part thereof, and although the defendant had not either before or since the said revocation, or at any time hitherto obtained, nor had there been any determination by Lieutenant-Colonel Wildman or any other referees or umpire, that he, the defendant, had or that there was adequate and just cause of or for such revocation by the defendant as aforesaid; and although a reasonable time for the obtaining such determination elapsed long before the said 7th day of July, 1850, yet that no part of the said last-mentioned sum had ever yet been paid.

The defendant set out the deed upon oyer, by which (after reciting the appointment of the plaintiff as auditor and superintending manager of the defendant's estates) the plaintiff, in consideration of the salary and compensation thereafter secured to the plaintiff, covenanted to perform the duties of the said offices, and "in order that he, the plaintiff, may be better able to devote his time and pains to the performance of the duties undertaken by him as aforesaid, that he, the plaintiff, shall not, during so long as he shall hold the offices to which he is hereby appointed, without the previous consent of the said earl, accept any other office or employment whatsoever," other than certain other offices therein specified, "and shall relinquish and give up his practice as a barrister, so far as such practice may be incompatible with, or in any manner interfere with the efficient and perfect discharge of the duties of the offices to which he is hereby appointed, and shall, if so required by the said earl, totally relinquish and give up such his practice." It then stated the defendant's covenant to pay the said annual salary during so long as the plaintiff should hold the said offices, and "that in case the plaintiff should cease to perform the duties of the offices to which he was thereby appointed by reason of his becoming incapable of performing such duties from permanent illness or infirmity, or in case the said earl should revoke the appointment thereby made without adequate or just cause (the adequacy and justice of such cause to be determined as thereafter mentioned), or in case the plaintiff should resign the said offices upon adequate or just cause, the adequacy and justice of such cause to be determined as thereafter mentioned," then and in any such case the defendant covenanted to pay to the plaintiff a retiring pension of 1,000*l.* a year; and "that the adequacy and justice of the cause of any revocation by the said earl, of the appointment thereby made, and the justice and adequacy of the cause for the resignation by the plaintiff of the said offices, should be determined by John Wildman, of &c., lieutenant-colonel in her majesty's army, if living and able and willing to determine the matter in question, and in case he should be dead, or unable or

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unwilling to determine the matter in question, that the same should be determined by two referees, to be named by the plaintiff and defendant respectively, or, in case of their differing, by an umpire to be named by them; and in case either party should refuse or omit to appoint a referee, or should appoint a referee who refused or omitted to join in appointing an umpire, that the referee named by the other party should be entitled to make an award which should be binding.

The defendant then pleaded to the first count that, before the said 7th day of July, 1850, to wit, on &c., the defendant revoked the said appointment of the plaintiff in the said first count mentioned, and the plaintiff thereupon and thereby then ceased to hold, and thence hitherto ceased to hold the said offices to which he was so appointed as in the said first count mentioned, without this, that the plaintiff held the said offices of auditor and superintending manager to which he was so appointed as aforesaid, during the whole period of time between the 7th of January and the 7th of July, 1850, *modo et formâ*.

To the second count the defendant demurred specially, on the ground that it did not appear that the question of the adequacy or justice of the cause of revocation had been determined in the way prescribed by the indenture.

The plaintiff demurred to the plea to the first count, on the ground (*inter alia*) that it raised an immaterial issue, and that the plea answered part only of the cause of action, and joined in demurrer to the second count.

F. Thesiger (Attorney-General, *Garth* with him) for the plaintiff.¹ First, as to the plea to the first count. The plaintiff in that count claims the salary for the whole of the half year, between the 7th of January and the 7th of July, 1850, or if he is not entitled to the whole, then, at any rate he claims a proportionate part of the salary for the period between these dates, during which he continued to hold the offices of auditor and superintending manager of the defendant's estates. The defendant, by his plea merely denies that the plaintiff held the offices during the whole of the half-year; so that the plea affords no answer to the plaintiff's claim for the proportionate part of the salary for the time during which he is admitted to have held the offices. If, therefore, the plaintiff is entitled to the proportionate part, the plea is bad. Although by the common law he would not be so entitled, under the 2d section of the 4 & 5 Will. 4, c. 22, this salary is apportionable. The words of that section are, "That from and after the passing of this act, all rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, made payable or coming due at fixed periods, under any instrument that shall be executed after the passing of this act, shall be apportioned, so that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, on the determination by any means whatsoever of the

¹ April 30, before LORD CAMPBELL, C. J., ERLE, J., CROMPTON, J., and WIGHTMAN, J.

interest of any such person, he or she, and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions and other payments." The words "all payments of every description becoming due under any instrument" are sufficiently large to embrace cases of this kind. If the plaintiff had died the day before the half-year ended, it would have been a great hardship upon him to have been deprived of his whole half-year's salary; and this is one of the evils which the statute intended to remedy.

Secondly, as regards the demurrer to the second count. The 1,000*l.* retiring pension was to become payable to the plaintiff upon a revocation of his appointment by the defendant without adequate and just cause; and the second count, which alleges such a revocation, shows a good cause of action in respect of the retiring pension. But the defendant relies on the clause as to arbitration; but, in the first place, that clause is not binding upon either of the parties, so as to oust the jurisdiction of the courts. Either party was at liberty to refer the question as to the adequacy and justice of the cause of revocation to the decision of a court of law. This is clearly so when the arbitration clause extends to the whole deed. *Thompson v. Charnock*, 8 Term Rep. 139; *Russell on Arbitration*, p. 66; and the same rule has been held to prevail where the clause extends, as here, to only one provision in the deed. *Goldstone v. Osborn*, 2 Car. & P. 550; *Kill v. Hollister*, 1 Wils. 129. Suppose the referees could not agree upon an umpire, one party might be without remedy. See *Russell on Arbitration*, 68, 69. But in the next place, supposing the arbitration clause is binding, then the 1,000*l.* is payable upon the revocation, unless there has been a determination, in the manner pointed out by the deed, that there was adequate and just cause for the dismissal; and the *onus* of showing that there has been such a determination lies upon the defendants.

[WIGHTMAN, J. May not this be the meaning:—If Mr. Lowndes resigns, then, in order to entitle himself to the pension, he must show that there was adequate and just cause for the resignation; but if Lord Stamford revokes, then he must show good cause for the revocation, otherwise the pension becomes payable?]

That is so. The contract is intended by both parties to be a continuing one, and the object was to prevent either from putting an end to it without adequate cause. If, therefore, the plaintiff resigns without obtaining a determination that he had good cause for the resignation, he loses his pension; but if Lord Stamford revokes without obtaining a determination that he had good cause, then he is bound to pay the pension. The event which is alleged to have occurred is a revocation by the defendant, not a resignation by the plaintiff, and the plaintiff cannot be called upon to prove a negative, as he would have to do if he were obliged to show that Lord Stamford had no cause for dismissing him. In the somewhat analogous case of master and servant, where the master dismisses his servant without notice, the servant is entitled to his month's wages, unless the master can show that the misconduct of the servant justified the dismissal;

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but the *onus* of proving misconduct is wholly thrown upon the master.

J. A. Russell, for the defendant. First, as to the plea to the first count. The question is, whether the allegation that the plaintiff held the offices during the whole period between the 7th of January and the 7th of July, 1850, is material. It is contended that it is so, because the salary was not apportionable. This depends upon the construction of the Apportionment Act, the 4 & 5 Will. 4, c. 22. The words "payments of every description" in that act, though apparently large enough to embrace cases of this kind, are restrained by the preamble of the act, and by the context, to payments which are to be made at fixed periods, and which will continue to be payable notwithstanding the right of a particular individual to receive them ceases. The preamble recites "that rents, annuities, and other payments due at fixed periods are not apportionable." The "other payments" there must refer to other payments *ejusdem generis* with rents and annuities. Again in the 2d section, the terms "rents, annuities," &c. which precede the words "all other payments," seem to show the particular description of payments to which the provision is meant to extend, and the word "interest," which occurs later in the same section, would be quite inapplicable to a contract between master and servant where the obligation to pay by the one party is only coextensive with the right of the other to receive.

Secondly, as to the demurrer to the second count. The cases cited by the other side as to parties not being bound by agreements to refer do not apply. The question here is as to the construction of a particular covenant, and that will depend upon the intention of the parties as apparent upon the face of the deed. *Pordage v. Cole*, 1 Wms. Saund. 320, a, 4. The intention of the parties was, that whether the plaintiff resigned, or the defendant revoked the appointment, an inquiry should take place whether there was good cause for such resignation or revocation; and the payment of the retiring pension was to depend upon the result of that inquiry. If the qualifying words form part of the covenant, they do so equally in the case of the defendant's revocation as of the plaintiff's resignation. Suppose the plaintiff to have resigned, could he have sued for his retiring pension without obtaining a determination by the referee? If he could not, neither can he now sue without it. If qualifying words form part of a covenant, they must be so treated in pleading. *Clayton v. Kynaston*, 2 Salk. 573. In *Worsley v. Wood*, 6 Term Rep. 710, a party insuring in the Phoenix Company was held not entitled to recover until he had obtained certain certificates, which by the proposal of the company, he was bound to procure, and that although the certificates might be refused by the persons from whom they were to be obtained. So, in *Thurnell v. Balbirnie*, 2 Mee. & W. 786; s. c. 6 Law J. Rep. (N. S.) Exch. 255, the defendant had agreed to purchase goods at the valuation of certain persons named, Newton and Matthews; and it was held, that he was not liable for the price of the goods until they had been valued by both the valuers. He also cited *Hothorn v. The East India Company*, 1 Term Rep. 638.

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The *Attorney-General*, in reply. First, as to the apportionment. Supposing the plaintiff had died in the middle of the half year, the statute would surely have applied, and it would have been a great injustice if his family had been deprived of an adequate recompense for his services. If so, it applies equally where the payment is stopped by an act over which he has no control. Then, as to the second count. *Thurnell v. Balbirnie* and *Worsley v. Wood* do not apply. In both those cases the covenantors had undertaken to pay only upon condition that certain things were done by the covenantee. But here the act upon which the salary is to become payable is to be done by the covenantor himself. Upon his revoking without having obtained a determination in the mode prescribed, he is to pay the 1,000*l*. Whether a condition is precedent or subsequent depends upon the language of the deed. And that which is a condition precedent, as to one clause of a covenant, may not be so as regards another clause of the same covenant. If Mr. Lowndes resigned, it would undoubtedly be a condition precedent to his right to sue that he should obtain a determination that he had good cause for resigning, because he would be *prima facie* a wrong-doer in discontinuing a contract which was intended to be lasting. But for that same reason, if Lord Stamford revoked, the *onus* would be on him to show good cause for it, otherwise Mr. Lowndes would have an immediate right to the pension.

Cur. adv. vult.

The judgment of the court was now delivered by —

LORD CAMPBELL, C. J. We think that on the demurrer to the plea to the first count there ought to be judgment for the defendant. The plea, averring that the defendant had revoked the appointment of the plaintiff before the 7th of July, 1850, when the half-year's salary sued for is alleged to have become due, concludes with a special traverse of the allegation that the plaintiff held the office of auditor during the whole half-year down to the said 7th of July. The plaintiff's counsel, admitting that he can only seek to recover a portion of this half-year's salary, and that at common law it could not be apportioned, rests this claim entirely on the statute 4 & 5 Will. 4, c. 22 s. 2. The language there employed by the legislature is very general; but we do not think that it was meant to apply to a payment like this, under a contract between employer and employed for services performed, where the payment entirely ceases upon the determination of the claimant's right to receive it. The statute contains the enumeration of "the estate, fund, office, or benefice from or in respect of which the rents or other payments shall be issuing or derived," and the deed contains the expression of "offices of auditor and superintending manager," to which the plaintiff was appointed; but looking to the context, it appears to us that these are not offices within the meaning of the enactment, not being of a public nature, and no rents nor payments issuing or being derived from or in respect of them.

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The dismissal from an employment created by contract can hardly be called the determination of the interest of the person employed. The time fixed by the statute when the apportionment is made recoverable is, "when the entire portion of which such apportioned parts shall form part, shall become due and payable." This contemplates a case where the party who has to pay will have to pay for the whole period to some one, and not a case where the payment entirely ceases with the determination of the interest of the person receiving the apportionment, and where the entire portion of which this forms a part never does become due or payable. We are, therefore, of opinion that the half-yearly payment in question remains unapportionable, as at common law.

On the demurrer to the second count of the declaration, our judgment will be for the plaintiff. The allegations in this count appear to us sufficient to show that after the revocation he was entitled to the sum of of 1,000*l.* a year, payable half-yearly. We think that the deed makes no attempt to oust courts of their jurisdiction, and that the numerous cases cited on this subject are wholly inapplicable. We have to peruse the deed executed by these parties, and to see what was the real contract between them. If the defendant had power to dismiss the plaintiff upon the statement that he had adequate and just cause, throwing upon the plaintiff, after the dismissal, the burthen of appealing to Colonel Wildman, the second count of the declaration would be bad; but we think that the defendant had no power of dismissal, without giving a right to the allowance of 1,000*l.* a year, till he had previously ascertained by the judgment of Colonel Wildman, or of the two referees, one named by each party, or of one referee named by himself, that he had adequate and just cause to revoke the appointment. The obtaining of this judgment was a condition precedent to the reserved power of revocation, and the payment of 1,000*l.* a year was to become due if there was a revocation without adequate and just cause, so previously ascertained. It appears by the deed that the plaintiff was a practising barrister, who, in consideration of this lucrative appointment, covenanted to give up practice as far as was inconsistent with the duties he undertook as auditor, and to give up practice altogether at the request of the defendant. It was of great importance to him that he should not be capriciously dismissed from his auditorship. Again, the defendant placed the plaintiff in a situation of great confidence; and very inconvenient consequences might follow to the defendant, if the plaintiff, from caprice, or from wishing to enter into some still more profitable employment, should without adequate and just cause resign the auditorship. Both parties had entire confidence in Colonel Wildman, and the agreement between them was, that till his judgment had been obtained that there was adequate and just cause for removal or resignation, the one party should not be at liberty to remove, nor the other to resign; the defendant covenanting that if he be removed without such judgment, he should pay the plaintiff 1,000*l.* a year during their joint lives. If such was the agreement, the demurrer to the second count cannot hold, for the plaintiff was not bound to show that he

had obtained, or that there was any determination in the mode prescribed as to the adequacy or justice of the revocation, or that it had been determined that the revocation was without adequate or just cause; nor was it necessary to aver that a reasonable time had elapsed for the defendant or for the plaintiff to have obtained such determination, or to allege any excuse for the plaintiff not having obtained it. The revocation having taken place without the previous determination in the prescribed form of the existence of adequate and just cause, the annuity of 1,000*l.* became payable, and the arrear claimed is recoverable. The decision of the Court of Exchequer in *Thurnell v. Balbirnie* was on a contract of a totally different nature, the defendant having agreed to purchase goods from the plaintiff, the price of which was to be fixed by two individuals named; and it was very properly held that the defendant could not be liable for the price of the goods until they had been valued by both valuers, pursuant to the agreement, at least without an averment that the defendant prevented the valuation. *Worsley v. Wood* proves that if there be a condition precedent, to be performed by the plaintiff before he has a right of action, his declaration must aver the performance of the condition. Very sound doctrine is likewise to be found in *Clayton v. Kynaston*, respecting a proviso which goes by way of defeasance of a covenant; but it has no tendency to show that upon the construction of this deed, if the defendant revoked the appointment without adequate and just cause previously determined in the manner described, he would not be liable for the payment sought to be recovered. On the second count, therefore, our judgment is for the plaintiff.

Judgment for the defendant on the first count; for the plaintiff on the second count.

November 9. The Court of Queen's Bench having given judgment for the defendant on the demurrer to the plea to the first count, and for the plaintiff on the demurrer to the second count, a writ of error was brought by the defendant, and argued Nov. 9, before Jervis, C. J., Pollock, C. B., Alderson, B., Maule, J., Platt, B., Talfourd, J., and Martin, B., by

A. J. E. Cockburne, for the plaintiff in error, (the defendant below); and

Boville, contra.

In the course of the argument it was agreed, upon the suggestion of the court, that the plaintiff should waive the judgment in his favor upon the second count, and that it should be referred to an umpire (already named, in pursuance of the deed) to determine whether the revocation of the appointment by the defendant was with adequate and just cause or not.

The judgment of the Court of Queen's Bench for the defendant upon the first count was not impeached by the plaintiff.

 Bastow v. Gant.

BASTOW v. GANT, Administrator, &c.¹

May 22, 1852.

Bail—Mayor's Court of London—Removal of Cause from—Foreign Attachment—Executor—Special Bail.

The general rule that, where an action against an executor is removed from an inferior court, the defendant is not bound to put in special bail, does not extend to the case of an inferior court, where a custom of foreign attachment exists, which can only be dissolved on putting in special bail.

THIS was an action in the Lord Mayor's Court, brought under the following circumstances:—A debtor of the plaintiff (since deceased) had insured his life in an insurance office in the city of London, for 400*l.*, and had deposited the policy with the Royal British Bank, as a security for advances made by them to him. At his death, the defendant, who was also a creditor, took out letters of administration to his effects, and the plaintiff thereupon brought this action against him in the Lord Mayor's Court, and issued a foreign attachment against the money in the hands of the insurance company. The action and the foreign attachment were afterwards removed by *certiorari* into this court; the return being filed on the 29th of April, 1852, when common bail was filed and notice given. On the 14th of May, an order was made at chambers by Coleridge, J. that, unless the defendant put in special bail in six days next after notice of the rule should be given to him, a *procedendo* should issue for the plaintiff.

Locke now moved for a rule, calling upon the plaintiff to show cause why this order should not be discharged, and why the common bail filed by the defendant should not be deemed sufficient.² This being an action against an administrator, it does not fall within the rule sanctioned in *Day v. Paupierre*, 13 Q. B. Rep. 802; s. c. 18 Law J. Rep. (N. S.) Q. B. 270, that special bail must be put in where a cause is removed by *certiorari* from the Lord Mayor's Court.

[LORD CAMPBELL, C. J. Does the process of foreign attachment apply to an executor or administrator?]

It does generally; but, according to the practice of the Lord Mayor's Court, common bail only is required in such a case. In *Ashley, on Foreign Attachment*, p. 26, under the head of "Property Attachable," is mentioned—"Goods or money belonging or due to the estate of a testator or intestate in an action against the executor or administrator for a debt due by the deceased. And here it may be observed, the reason is that, although an action of debt cannot, by the law of the land, be brought against an executor or administrator, yet, by the custom of London, it may, and all attachments are grounded on ac-

¹ 21 Law J. Rep. (N. S.) Q. B. 377.

² A summons to the same effect had been taken out at chambers, but ERLE, J., refused to make any order upon it.

tions of debt. But the custom does not authorize a creditor to arrest either an executor or administrator; therefore, the attachment, which is equivalent to an arrest, may be dissolved by common bail."

[LORD CAMPBELL, C. J. If that be the rule, the process is quite illusory against the executor.

ERLE, J. It was said at chambers that the statement which you have read was to be found in no other book treating of the Mayor's Court, and that the practice, as it existed there, was otherwise. I thought that if an executor could not appear effectively in the court below, without putting in special bail, that he ought to do so here also. But it by no means follows that if he could appear there without putting in special bail, he could do so here.]

The same rule is to be found in *Bac. Abr.* "Executors and Administrators," P, pl. 5. "Executors and administrators are not to be holden to special bail; for the demand is not on the persons, but on the assets of the deceased; and it would be unreasonable to subject their persons to an execution for the debt of another;" and in the margin is added, "so though the cause is removed from an inferior court to a superior; for this would encourage plaintiffs to commence their actions against executors in such inferior courts." *Page v. Price*, 1 Salk. 98, where Lord Holt said, that executors are not bound to find special bail where a cause is removed from an inferior court.

[LORD CAMPBELL, C. J. That does not apply to an inferior court, where there is a custom of foreign attachment.]

By a rule of this court, Hil. Term, 2 Jac. 2. (1686), "it is ordered that every defendant, not being an executor or administrator, who shall sue out any writ of *habeas corpus*, to remove any suit out of any inferior court, shall put in special bail in all actions whatever (actions for scandalous words and small assaults only excepted), unless one of the justices of this court shall otherwise order."

LORD CAMPBELL, C. J. I am of opinion that the order of my brother Coleridge was quite right. There is, no doubt, a general rule that executors or administrators cannot be compelled to put in special bail if a cause is removed from an inferior court. But the question is, whether there is not an exception to the rule in the cases where a custom of foreign attachment exists in the inferior court. It is conceded that the custom of foreign attachment extends to actions against executors, and, if so, they must be compelled to put in special bail below, for if the attachment could be dissolved by merely putting in common bail, the process would become wholly illusory, and would confer no benefit on the plaintiff. We ought, therefore, to have some authority to show us that this is not so. What is relied upon in *Bacon's Abridgment* only shows what is the general rule, and the rule of court which is referred to does not affect the present question. All the authority which remains, therefore, is that of *Ashley on Foreign Attachment*, who states that to be the practice, which is not supported by what takes place in the Lord Mayor's Court at the present day.

COLERIDGE, J. concurred.

Ex parte Phillips; In re Clabburn.

ERLE, J. It is clear, that in this court, without saying any thing as to the practice of the Mayor's Court, when a cause is removed from thence by the defendant, special bail must be put in; and I find no authority in any writer throwing any doubt on that rule existing in the case of executors. It clearly ought to apply there equally with other defendants, for if an executor could remove the cause here by merely filing common bail, he would be enabled to defeat the attachment without giving any security.

CROMPTON, J. It ought to be made out very clearly that the practice is as is suggested. I do not see that this has been done. None of the authorities, except the book of practice, apply to this particular case, and that book does not appear to be supported by any other writer or authority.

Rule refused.

*Ex parte PHILLIPS & another; In re CLABBURN.*¹

June 18, 1852.

Insolvent — Rehearing Petition — Jurisdiction — 1 & 2 Vict. c. 110, s. 96 — 10 & 11 Vict. c. 102.

The Court for the Relief of Insolvent Debtors has no jurisdiction to rehear the case of an insolvent who has been discharged by the judge of a county court under the 10 & 11 Vict. c. 102, s. 2.

Semble, that the judge of the County Court has power to rehear the case.

THIS was a motion, made on a former day in this term, on behalf of two of the creditors of R. G. Clabburn, an insolvent debtor, for a rule *nisi* for a mandamus to be directed to the court for the relief of insolvent debtors, commanding the said court to proceed to hear and determine an application for a rehearing of the said insolvent. The rule was moved for on an affidavit stating that the petition had been transmitted from the Insolvent Debtors Court to the County Court of Norwich, and that the hearing of the insolvent came on before the judge of that county court on the 16th of April, 1852, when the insolvent was adjudged to be discharged; that the applicants, two of his creditors, being of opinion that this adjudication had been improperly made, applied to the Court for the Relief of Insolvent Debtors for a rule or order upon the insolvent to show cause why he should not attend, and the said matter be reheard or otherwise, as the said court should direct; and that the application was refused, without going into the merits, on the ground that the Insolvent Debtors Court had no jurisdiction to interfere in ordering a rehearing.

¹ 21 Law J. Rep. (N. S.) Q. B. 379; 16 Jur. 859.

Ex parte Phillips; In re Claburn.

J. O. Griffiths, in support of the motion. The court has erroneously declined to exercise its jurisdiction. The 1 & 2 Vict. c. 110, s. 96, gives power to the Insolvent Court to order a rehearing upon the application of any creditor of an insolvent. By the 10 & 11 Vict. c. 102, s. 10, the circuits of the insolvent commissioners are abolished, and country petitions are to be referred for hearing to the county court of the district, and the judge of such county court is to have all the powers theretofore exercised by a commissioner on circuit. This act does not give the county court any original jurisdiction. The proceedings after the hearing must be retransmitted to the Insolvent Debtors Court. A commissioner on circuit had formerly no jurisdiction to rehear a case. *In re Willcox*, 13 Q. B. Rep. 666; s. c. 18 Law J. Rep. (N. S.) Q. B. 244, is in point. There the original adjudication had been made by a commissioner on circuit, and since that time the 10 & 11 Vict. c. 102, had passed, abolishing the circuits and transferring the jurisdiction to the county court. An application by the assignee to reëxamine the insolvent under the 1 & 2 Vict. c. 110, s. 98, was held to be properly made to the Insolvent Debtors Court, in London, and not to the judge of the county court, and a rule *nisi* for a mandamus to that effect was granted by the court, after time taken to consider, and no cause was shown against the rule. If this application cannot be heard by the Insolvent Court, the creditors will be deprived of all power of reviewing the decision, as the record is in the Insolvent Court, and the county court has no means of obtaining possession of it.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

LORD CAMPBELL, C. J. Upon a motion for a mandamus to the commissioners of the Court for the Relief of Insolvent Debtors to hear an application for an order for the rehearing of the case of an insolvent under 1 & 2 Vict. c. 110, s. 96, a question has been raised whether, in respect of an insolvent heard before the judge of a county court, and discharged by him under 10 & 11 Vict. c. 102, s. 10, the Court for the Relief of Insolvent Debtors has jurisdiction to make the order applied for; and we are of opinion that this question must be answered in the negative. There is no provision expressly giving this power to the court of the commissioners over the cases heard by the judges of the county court, and the provision in the 96th section of the former act does not in terms or in principle apply to these cases. In terms it does not apply to county courts; and in principle, although it was reasonable to vest the power of deciding or rehearing in a tribunal of which all, or at least one of the judges had presided over the former hearing, it would be inconvenient to require that a tribunal should have to decide whether a judge has been deceived, either by false evidence or otherwise, without having power of communicating officially with that judge upon a matter depending chiefly on what

¹ LORD CAMPBELL, C. J., COLERIDGE, J., WIGHTMAN, J., and ERLE, J.

In re Gray.

passed in his own mind. The rule must be refused, unless the jurisdiction exists in the Insolvent Debtors Court. It is not necessary to decide that the jurisdiction exists in any other tribunal. We forbear, therefore, to say more with respect to the power of the county court judges than that the words of section 10, conferring jurisdiction on them to hear originally appear wide enough to comprehend a power of rehearing; and we find no words restricting their power within the limits of the powers exercised by the commissioners upon circuit.

Rule refused.

BAIL COURT.

*In re GRAY.*¹

June 12, 1852.

Affidavit — Before whom sworn — Attorney, Commissioner.

An affidavit cannot be used in support of an application to the court, if it be sworn before a commissioner who is acting in the matter as attorney of the applicant, though there be no action pending, and no attorney on the record.

THIS was a rule calling upon an attorney to pay over a sum of money.

The affidavits on which the motion was granted were sworn before a commissioner who was acting in the matter as the attorney of the party on whose behalf the application was made.

Maynard showed cause. The affidavits cannot be used. The general rule of all the courts, Reg. Gen. Hil. term, 2 Will. 4, r. 1, s. 6, and the old rule of this court, Easter term, 15 Geo. 2, r. 11, prohibits the reading of affidavits sworn before attorneys of the parties. 2 *Arch. Prac.* 1216, 7th ed.

Prideaux, in support of the rule. The affidavits are admissible. There is no action pending. The rule of court applies only to prohibiting the attorney on the record in the action from acting as the commissioner. It has no reference to a case where the affidavits are taken previous to any application to the court, and where there is no record at all. *Read v. Cooper*, 5 Taunt. 81, is in point. There is no attorney on the record here. He referred also to *Doe d. Grant v. Roe*, 5 Dowl. P. C. 409.

WIGHTMAN, J. The Master reports that according to the practice the affidavits cannot be read.

Affidavit rejected.

¹ 21 Law J. Rep. (N. S.) Q. B. 380.

M'Kenzie v. The Sligo and Shannon Railway Company.

M'KENZIE v. THE SLIGO AND SHANNON RAILWAY COMPANY.¹

June 18, 1852.

Company — Winding-up Acts — Incorporated Railway Company — 13 & 14 Vict. c. 83, s. 30 — Retrospective Effect of — Action against Company — Order for Dissolution and Omission to prove Debt, no Bar — Staying Proceedings.

The 12 & 13 Vict. c. 108, (which came into operation on the 1st of August, 1849), by section 1, enacts, that the Joint-stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45), shall not apply to railway companies incorporated by act of parliament. The 13 & 14 Vict. c. 83, (passed on the 14th of August, 1850), by section 30, provides, that notwithstanding the provision in the 12 & 13 Vict. c. 108, that act, as well as the 11 & 12 Vict. c. 45, shall apply to any incorporated railway company, in respect of which an order for winding it up may have been made previous to the passing of the act of 1849, and that the proceedings for winding up the same shall proceed and be carried on under the Winding-up Acts of 1848 and 1849, or either of them:—

Held, that this clause was retrospective in its operation, and rendered valid proceedings for the purpose of winding up an incorporated railway company taken before the 14th of August, 1850.

The dissolution of a company by an order absolute under the Joint-stock Companies Winding-up Act, 1848, (11 & 12 Vict. c. 45), is no bar to an action against the company by a creditor. Neither can the omission by such creditor to prove his debt before the Master in Chancery be pleaded in bar to such an action; the appropriate remedy being under section 73, by an application to a judge to stay proceedings in the action until after proof made.

ASSUMPSIT upon an award, by which the defendants were directed to pay to the plaintiff a certain sum of money. Breach, non-payment.

There was also a count upon an account stated. The action appeared to be commenced on the 8th of March, 1850.

Fourth plea, that the defendants, to wit, on &c., and thence and until the making of the order absolute for dissolution thereafter mentioned, were a trading and commercial company, namely a railway company, incorporated by a certain act of parliament, to wit, &c., and that after the 14th of August, 1848, and before the making of the said order absolute, a certain petition was presented to the Court of Chancery by four of the directors of the said company, alleging that the plaintiff had commenced an action against them for a debt due to him, and praying that the company might be dissolved and wound up under the provisions of the Joint-stock Companies Winding-up Act, 1848; that the said court considered that it was just and equitable that the said company should be so dissolved and wound up; and that the said petition was afterwards, and before the making of the said order, to wit, on the 27th of April, 1849, advertised in the London Gazette, and duly served at the office of the company upon the secretary, and that afterwards, and before the 15th of August, 1849, and before the commencement of this suit, to wit, on

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&c., by a certain order of the said Court of Chancery it was ordered that the said company should be dissolved and wound up under the provisions of the said Joint-stock Companies Winding-up Act, and that it should be referred to the Master to wind up the affairs of the said company; and that by reason of the premises the said railway company became and was from the date of the said last-mentioned order absolutely and wholly dissolved. Verification.

The fifth plea stated as in the fourth plea; and in addition alleged that after the making of the said order absolute, to wit, on the 24th of May, 1849, the said order absolute was carried in before the said Master, and that by his direction advertisements were published in two successive numbers of the London Gazette, and in three other newspapers, by which notice was given that the said Master would at a day, hour, and place therein mentioned, being a day within fourteen days from the day of the publication of the first of the said advertisements, to wit, on &c., appoint an official manager of the said company under the said Joint-stock Companies Winding-up Act; and that afterwards, and within fourteen days from the day of the publication of the said first of the said advertisements, and before the commencement of this suit, the said Master appointed one E. C. official manager of the said company, who then accepted the said appointment, and became and was and still is the official manager of the said company, and that since the appointment of the said official manager no permission whatever had been given by the said Master to the plaintiff to commence or proceed with the present action, or any action whatever against the defendants, or against any other person representing the said company, and that no proof of the plaintiff's debt has at any time been made before the said Master or otherwise. Verification.

General demurrer and joinder.

Raymond, in support of the demurrer.¹ The fourth plea shows merely that an order absolute was made for dissolving the railway company, under the 11 & 12 Vict. c. 45. In order to make this a good bar to the action, the defendants must show that it is a complete discharge of the debt. But the effect of such an order is not to get rid of all the liabilities of the company, and to prevent them being afterwards sued at law for their debts. This is evident from the provisions in sections 50, 52, and 53, for suing the official manager, or substituting him as defendant in the place of the company in all actions and suits pending against them. This recognizes the right to continue or commence actions, and shows that the order is no discharge of the liability. Section 58 enacts, that the order shall not enlarge or diminish, or in anywise affect the rights or remedies of creditors, except as expressly provided; and turning to section 73, we find a mode provided by which proceedings improperly taken may be stayed, but

¹ June 1, before LORD CAMPBELL, C. J., COLERIDGE, J., and ERLE, J. CROMPTON, J. was at Nisi Prius, in London.

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there is no enactment that the action is to be finally put an end to, as it must be if this be a good plea in bar.

[COLERIDGE, J. The defendants will rely on the words of section 16.]

It still comes to the same question, whether "absolutely dissolved" has so extensive a meaning as to get rid of all previous liabilities. The clauses before referred to show that such a construction is not correct.

[COLERIDGE, J. Does it not mean dissolved so far as regards the power of suing or being sued?]

That would be inconsistent with the provisions for actions being afterwards carried on.

[LORD CAMPBELL, C. J. You say it is a dissolution only as to future transactions?]

That must be so. Then, as to the fifth plea, which is to the same effect as the fourth, except that it states the appointment of an official manager, and that there has been no proof exhibited of the debt, and no permission given by the Master to sue the company. This plea is framed on section 73 of the 11 & 12 Vict. c. 45, which does not provide a bar to the action, but only a stay of proceedings. But that act did not, when this action was commenced, apply to railway companies incorporated by act of parliament. Section 1 refers to companies within the 7 & 8 Vict. c. 111, which does not include railway companies incorporated by act of parliament. All doubt which existed on this subject is removed by the 12 & 13 Vict. c. 108, section 1 of which expressly defines the companies to which the former act is to be applicable, and it excludes "railway companies incorporated by act of parliament, to which companies such act shall not apply." This statute, by section 38, is to be construed as part of the 11 & 12 Vict. c. 45, and it is, therefore, plain that any proceedings which might have been taken after the 1st of August, 1849, would have been void.

[LORD CAMPBELL, C. J. The defendants rely on the 13 & 14 Vict. c. 83, and they say that whether the former proceedings were right or wrong they may now go on.]

That act, by section 30, provides, that notwithstanding the provision in the 12 & 13 Vict. c. 108, that act, as well as the 11 & 12 Vict. c. 45, shall apply to any incorporated railway company in respect of which an order for winding up may have been made by the Court of Chancery previous to the passing of the act of 1849, and that the proceedings for winding up the same shall proceed and be carried on under the Winding-up Acts of 1848 and 1849, or either of them. But this is only prospective so as to render valid proceedings taken after the 14th of August, 1850, when the 13 & 14 Vict. c. 83 passed; but it cannot have the retrospective effect of validating bygone proceedings which were without authority. The state of the law at the time when an action is commenced must regulate the proceedings throughout; and here, as no permission to sue could have been properly obtained, and no proof properly made when this action was commenced, the court will not hold that the plaintiff is

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thus retrospectively deprived of his right of suing at common law. Such a retrospective effect has never been given to a statute. In *Edwards v. Sherren*, 11 Mee. & W. 595; s. c. 12 Law J. Rep. (N. S.) Exch. 441, it was held, that the 5 & 6 Vict. c. 122, s. 24, rendering the Gazette in certain cases conclusive evidence of the bankruptcy, did not apply to adjudications made before the passing of that act. So, in *Hitchcock v. Way*, 6 Ad. & E. 943; s. c. 6 Law J. Rep. (N. S.) K. B. 215, the 5 & 6 Will. 4, c. 41, was held not to affect an action at issue before it passed, but tried afterwards. In *Moon v. Durden*, 2 Exch. Rep. 22, the majority of the Court of Exchequer held, that the 8 & 9 Vict. c. 100, which prohibits any suit being brought or maintained upon a wager, had not a retrospective effect so as to defeat such an action commenced before the statute passed. And in *Marsh v. Higgins*, 19 Law J. Rep. (N. S.) C. P. 297, the Bankrupt Law Consolidation Act was held not retrospective so as to deprive a creditor of his right to an action commenced before that act came into operation.

[LORD CAMPBELL, C. J. In those last two cases it is admitted that such a retrospective operation may be expressly given by the legislature. Here the 13 & 14 Vict. c. 83 is retrospective both in terms and in its scope, and the only reasonable construction of the words of section 30 is to give validity to all proceedings before taken.]

It only has the effect of allowing such proceedings to be taken in future; and it probably would now give a right to stay the proceedings, but there is no bar to the action.

Wordsworth, contra. These proceedings were valid. The 11 & 12 Vict. c. 45, recites the 7 & 8 Vict. c. 111, and applies to the same companies, including railway companies. *Ex parte Barber*, 1 Mac. & G. 176; s. c. 18 Law J. Rep. (N. S.) Chanc. 242.

[LORD CAMPBELL, C. J. We need not give any opinion on the 11 & 12 Vict. c. 45, if the 13 & 14 Vict. c. 83 has given validity to previous proceedings in respect of such companies.]

Then, as to the fifth plea. It is intended to raise a defence in accordance with the decisions of the Court of Exchequer in *Macgregor v. Keily*, 4 Exch. Rep. 801; s. c. 19 Law J. Rep. (N. S.) Exch. 126, and *Prescott v. Hadow*, 5 Exch. Rep. 726; s. c. 1 Eng. Rep. 487. It is not contended that the plaintiff's right of action is entirely gone, but that he must go before the Master and offer proof of his debt, or obtain permission to sue before he can bring his action. The judgment of Parke, B., in *Thompson v. The Universal Salvage Company*, 3 Exch. Rep. 310; s. c. 18 Law J. Rep. (N. S.) Exch. 242, is in point.

[LORD CAMPBELL, C. J. There are repeated instances of such actions being stayed; and the question is, whether, if an action is prosecuted against the express words of a statute, that may not be pleaded as a defence.]

Raymond, in reply. The specific mode of putting a stop to the action, which is provided by section 73, must be resorted to. If a plea in bar could be supported, it would be impossible for the plain-

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tiff to proceed even after having proved his debt. But no answer has been given to the argument, that proceedings taken in the interval between the two acts were valid.

[*Per Curiam.* We must take it that the 13 & 14 Vict. c. 83 makes the order and subsequent proceedings valid. As to the other point, we will take time to consider.]

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. In this case, upon a demurrer to the fourth plea in bar of the action, the question has been raised whether the dissolution of the company under the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, was a bar to the action, and upon the demurrer to the fifth plea, the question is raised under section 73 of the same act, whether the omission to prove the claim before the Master was a bar. We are of opinion that there ought to be judgment for the plaintiff on these demurrers, the pleas being bad. There is no provision in the statute taking away the common law remedies for a debt upon a dissolution under the statute; on the contrary, by section 58 it is enacted, that nothing in the act shall alter or affect the rights or remedies of creditors. And with respect to prohibiting any action, after an order for dissolution, until proof before the Master, under section 73, it is clear that no bar to the action is created, but a suspension until proof made or exhibited, after which the creditor is at liberty to proceed with the action, as was decided in *Prescott v. Hadow*. As the 73d section provides an appropriate remedy for suspension of the action until after proof, by application for an order to stay proceedings, full effect is given to all parts of the section by holding that the action may be stayed by a judge's order until after proof, but is not barred altogether.

Judgment for the plaintiff.

WILSON v. EDEN.¹

May 4, 1852.

Devise — Leaseholds — General Devise — 1 Vict. c. 26, s. 26 — Intention.

A testator by his will, made in 1815, gave "all the rest, residue, &c., of his personal estate, goods and chattels, &c." to M. J. D. absolutely; and he further devised "all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, &c., at or near W., in the county of D., and B., in the county of Y., and all other his real estates in the said counties and elsewhere, and all his estate and interest therein," to uses in strict settlement. In 1841 the testator made a codicil ratifying and confirming his will. At the time of his making his will and of his decease, the testa-

¹ 21 Law J. Rep. (N. S.) Q. B. 385; 16 Jur. 1017.

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tor was possessed of freehold estates in the county of D., and of some church leases in the same county, which were usually renewable every seven years; in some instances the leaseholds were let and occupied, with the freeholds, at undivided yearly rents. Upon part of the leaseholds, nearest to the freehold mansion, ornamental cottages were built, as well as buildings occupied by persons employed about the mansion and freehold estate.

Held, that, under the 1 Vict. c. 26, s. 26, the leaseholds passed under this general devise, and that no contrary intention appeared upon the will so as to prevent the operation of that section.

THIS was a case stated for the opinion of this court by the Master of the Rolls. A case in precisely the same terms had been previously stated for the opinion of the Court of Exchequer, and will be found set out at length in *Wilson v. Eden*, 5 Exch. Rep. 752; s. c. 2 Eng. Rep. 345. It is therefore unnecessary to repeat it here.

The present case was now argued, by

F. Kelly (Solicitor General), for the plaintiff.

Malins, who appeared for the defendant, was not called upon by the court.

LORD CAMPBELL, C. J. I have read over the will most attentively, as well as the judgment of Lord Langdale and that of the Court of Exchequer, and I have listened to the able argument of the Solicitor General; but as we entertain no doubt at all upon the just construction of the will, it is not necessary to call upon the opposite counsel to argue. I concur entirely in the conclusion and the reasons contained in the judgment of the Court of Exchequer. It is unnecessary to give any opinion as to how we should have decided this case prior to the Wills Act; but I entertain no doubt at all, with most sincere respect for Lord Langdale's judgment, that this does come within the 26th section of that act, which enacts, "that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate, if the said testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will." Now here we have, as it seems to me, a devise of the land of the testator in a place most distinctly set out. He devises, "All my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments situate, lying, arising, and being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Brignall, in the county of York, and a parcel of land purchased by me of the late Mrs. Mary Lambton, at Romanby, near Northallerton, in the North Riding of the county of York." It is admitted by the Solicitor General that if the devise had stopped here, it clearly would have come within the 26th section of

the Wills Act; but it is said that it is taken out of that section by the words which follow, "and all other my real estates in the said counties of Durham and York, and elsewhere in Great Britain, and all my estate and interest therein." Why are those words, which are admitted to have been a devise of the lands of the testator and of the lands of the testator occupied in a particular place, not still the same? I cannot understand why they are not so, because of the use of these latter words. If that be so, this codicil, having been executed subsequently to the passing of the Wills Act, is to be regulated by it, and unless a contrary intention shall appear by the will, the leasehold estates are to pass just as much as if they were specifically there mentioned. That brings us to the question whether there be any contrary intention. Now, what I understand to be the principle of construction is this; you are not, in construing the will, to look to any technicalities to get at a contrary intention; but you are to find what was the intention of the testator as appears by the language used in the will, taking into consideration all the facts which are to be considered when the will is to be construed. If, in this way of looking at it, there appears to have been a contrary intention, then the devise will remain as it was before the Wills Act passed; but unless a contrary intention appears upon the will (and the *onus* of showing this is thrown upon those who say that the leaseholds did not pass), then the leaseholds do pass. The case is quite different, as it appears to me, from what it was before the Wills Act passed, because the former decisions depend upon the technical rule, that leaseholds would not pass under a general devise of lands, unless there were some clear manifest acknowledged peculiarity in the will by which the intention of the testator was clearly manifested; and accordingly in those cases we hear judges saying, with regard to the testator, "*Si voluit non dixit*;" but we must now see that he did not, in his own mind, according to the language he has used, intend that the leaseholds should pass by this devise. I must say I entertain no doubt whatever upon the facts here stated, that it was the intention of the testator that the church leases should pass as well as the freehold estates. It was always treated as one estate, and it was thereafter to be treated as one estate, and there is no incompatibility at all in its being so treated, when we know, with regard to the church property, that as it had long been in the possession of a particular family, it was considered as belonging to the family, the church having a right to the periodical payments till the lease was renewed. It is treated as part of the property of the family. Now, here the Solicitor General has pointed out the great inconvenience that would arise from the first tenant in tail taking the absolute interest in the leaseholds; but substantially he would take the same interest in the freeholds, because he would only have to execute a disentailing deed, and then he would have an absolute interest in the freeholds as well as the leaseholds, and he might re-settle the whole anew. I have not heard any sufficient reason to make me doubt that it was the intention of the testator that the church leases should pass along with the freeholds, and that they should still continue to be treated as part of

the family estate. Therefore, nothing appearing to show a contrary intention, and this coming, as it seems to me, clearly within the 26th section of the Wills Act, I am of opinion that the leaseholds and the freeholds will both pass together accordingly.

ERLE, J. I have also considered the judgment of the Court of Exchequer, and am perfectly satisfied therewith. It appears to my mind clear that the words of this devise are within the operation of the 26th section of the 1 Vict. c. 36. They are capable of passing chattels real, if there had been no freeholds to supply the terms of the devise. Then the church leases held under the church of Durham, being capable of passing under this devise, the question arises whether, upon the statement now made to us, the intention of the testator that they should not pass is made to appear, and I cannot find any such intention; but, on the contrary, looking at the matters which I may take into my mind with the words of the will, I believe that the intention that they should pass existed. In construing the words of the will I have a right to look to the nature or the property, and the circumstances of the estate at the time when that will was made. Looking, therefore, to the nature of these chattels real, that they are renewable leases, granted by a permanent body, — the property evidently being considered as permanent as a fee — looking, too, at the contiguity of the church lands to the freehold lands; looking at the unity of occupation (if I may use that expression), that part of the church lands was let together with the freehold lands at one rent, and that a part of the church lands was used for the ornamenting the mansion, which stood upon the freehold land, and that another part of the church lands was occupied by some of the retainers employed about the mansion on the freehold lands, it carries to my mind the conviction that the church lands and the freehold lands were in a manner looked upon as one estate; that there was an unity of estates in the mind of the testator, and that he intended so to pass them. On the other side there is, in the language of the will, that which is not applicable to the subject of the devise thus construed, namely, a strict settlement of the real estate. That strict settlement, technically, would be very inaccurate in regard to leasehold property. It is argued, that the person who drew this will must have been perfectly well aware that leasehold property would be classed in law under personalty, and that the freehold property would be classed in law under real estate, and it is, therefore, assumed that he must have intended that the leasehold property should pass under the description of personalty; but it seems to me, at the time when you import into the construction of a will the supposed legal knowledge of the framer of that will, as contradistinguished from the testator's legal knowledge, that you ought to take two other propositions into consideration, namely, whether the testator adopted the knowledge that leaseholds would be held to pass as personalty, and also knew that these very lands were, on the understanding of both of them, leaseholds. It appears to me to be perfectly possible that the framer of the will might have known no distinction between the title to the lands in

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Merrington, and the title to the adjoining lands in the other townships; and that, although, if he had been informed of it, he would have made provision in respect of the leaseholds, yet that, not being informed of it, he has drawn the will in this way. I do not think that the supposed inference, from the legal knowledge of the framer of the will, at all countervails the other facts I have adverted to, which would operate upon the mind of an ordinary testator; and, to my mind, they strongly countervail all those arguments of technical construction which are put against that which really bears upon my mind when I am to decide what was the intention of the testator. For the reasons I have given, I think the words are capable of passing these leases, and that a contrary intention of the testator is not made to appear.

CROMPTON, J. I am quite of the same opinion. The real question in the case is, whether it is made out by the party on whom the burthen is thrown by the statute, that there is an intention appearing in the will that the leases were not intended to pass by this devise. That burthen is thrown upon the next of kin, and I do not think that he makes it out. I do not think that it is at all necessary to go into the question how it would have been before the statute. No doubt the mode of limitation, and other matters, might have been strong arguments before the statute, that the leasehold estates would not have passed. But the burthen is now shifted; and, in my mind, the probability is that they were intended to pass by the devise. From the way in which the lands are mixed up for the convenience of the owners of both the freeholds and the leaseholds, and it not being likely that the testator would have meant to split both properties by dividing it, I cannot say that a contrary intention is made out to my satisfaction; and that being so, the judgment of the Court of Exchequer was right, and our certificate should be in accordance with that sent by that court.

A certificate to the above effect was afterwards sent.

BARNES v. MARSHALL.¹

June 11, 1852.

County Court — Jurisdiction — Contract with Carrier — When Cause of Action arises — Prohibition.

A carrier and wharfinger, residing at Swindon, in Wiltshire, agreed in writing with M., who resided in Surrey, to barge timber from Swindon Wharf to London, at any wharf there, at 16s. per ton, to include all charges except wharfage. It was necessary to haul the tim-

¹ 21 Law J. Rep. (N. S.) Q. B. 388; 16 Jur. 1086.

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ber from the place where it lay to be loaded on board the barges, and at times when the horses of M. were not on the spot, the carrier provided horses, and hauled the timber. A plaint was afterwards brought in the county court for the district of Swindon against M. for 50*l.*, the balance of account claimed by the carrier, including two items, amounting to 1*l.* 16*s.*, for hauling:—

Held, that the hauling of the timber and the carriage of it to London constituted but one cause of action; and, that as such cause of action did not arise until the delivery of the timber in London, the judge of the Swindon county court had no jurisdiction to try the plaint under the 9 & 10 Vict. c. 95, s. 60.

In this case a rule *nisi* had been obtained for a prohibition to the judge of the county court of Wilts, within the district of Swindon, to stay further proceedings in the plaint, on the ground that the cause of action had not arisen within the jurisdiction of the court. The affidavits stated that the plaintiff was a carrier and wharfinger residing at Swindon, and the defendant resided in Surrey. That the action was brought for the carriage of timber from Swindon by canal to London, under the following contract in writing:—“Memorandum. I hereby agree to barge Mr. Marshall's timber from Swindon wharf to London, at any wharf there, at 16*s.* per ton, string measure, to include all charges, except wharfage.” Before the timber was put on board the plaintiff's barge, it was lying in a field on one side of the canal, at a short distance from the bank, and it was necessary to haul it to the other side, where there was a crane for loading it into the barge. When the defendant's horses were on the spot, the timber was hauled by them to the plaintiff's wharf, and at other times the plaintiff provided a team for hauling it from the field. The whole claim of the plaintiff was 50*l.*, being the balance after giving credit for payments made by the defendant; and two of the items in the plaintiff's demand, amounting to 1*l.* 16*s.*, were for hauling.

Hodges showed cause. By sect. 60, of the stat. 9 & 10 Vict. c. 95, “a summons may issue in any district in which the defendant, or one of the defendants, shall dwell or carry on his business at the time of the action brought, or, by leave of the court for the district in which the defendant, or one of the defendants, shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned courts.” The money for the carriage was earned within the jurisdiction of the county court of Swindon. The plaintiff, being a carrier by canal, and wharfinger, is a common carrier; *Maving v. Todd*, 1 Stark. 72; and at common law a carrier is entitled to be paid for the carriage of goods as soon as they are delivered to him to be carried. *Pickford v. The Grand Junction Railway Company*, 8 Mee. & W. 372; s. c. 10 Law. J. Rep. (N. S.) Exch. 342; *Wyld v. Pickford*, 8 Mee. & W. 443; s. c. 10 Law. J. Rep. (N. S.) Exch. 382.

[CROMPTON, J. The Court of Exchequer did not say in that case that the carrier could sue for the carriage of the goods before he had carried them.

LORD CAMPBELL, C. J. When did the cause of action arise?]

At the moment of the plaintiff's receiving the timber into his barge at Swindon.

[**LORD CAMPBELL, C. J.** A carrier is not bound to take goods without payment of his hire or reward for carrying them. Sometimes, by special contract, freight is paid at the port of shipment, and then, if the goods are lost, the freight is not to be repaid; but a special contract must be shown to entitle a carrier after he has received goods, to bring an action for the price of their carriage before he has delivered them. What would be the form of the plaintiff's demand?]

The declaration would state that the goods were received by the plaintiff as carrier, and that no contract was made by which he was deprived of his common law right to demand his hire or reward. Secondly, as to two of the items which constitute the charge for hauling, the cause of action arose within the jurisdiction; and if any part of the cause of action arose within the jurisdiction, this court will not grant a prohibition. The plaintiff could have recovered for those items, independently of the rest, if the other work had never been done. He cited *Harwood v. Lester*, 3 Bos. & P. 617.

Bovill, contra. The 128th section of the stat. 9 & 10 Vict. c. 95, gives concurrent jurisdiction to the superior courts "where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought;" and, therefore, under that section, where any one item of the plaintiff's demand arises within the jurisdiction of the county court, the Superior Court has not concurrent jurisdiction. *Wood v. Perry*, 3 Exch. Rep. 442; s. c. 18 Law J. Rep. (N. S.) Exch. 161. But the language of section 60 is essentially different, and requires that the whole cause of action should arise within the jurisdiction of the county court in which the plaint is sued out, and upon that section, *Buckley v. Hann*, 5 Exch. Rep. 43; s. c. 19 Law J. Rep. (N. S.) Exch. 151, and *Wilde v. Sheridan*, 21 Law J. Rep. (N. S.) Q. B. 260; 11 Eng. Rep. 380, are authorities in support of the rule. It has been held, in *Re Grimby v. Aykroyd*, 1 Exch. Rep. 479; s. c. 17 Law J. Rep. (N. S.) Exch. 157, that the term "cause of action" in section 63, by which "it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits," means "cause of one action," so that a plaintiff may not make three separate causes of action out of one contract or demand; and the same construction is to be given to section 60. The whole cause of action on which the plaintiff sues must have arisen within the jurisdiction of the county court.

[**CROMPTON, J.** Suppose the two demands were distinct, it would be difficult to say that the county court had no jurisdiction. Suppose the plaintiff had sued for the price of the hauling before the price for the carriage was due.]

The charge for the hauling and that for the carriage of the timber are put together in the plaint as one cause of action; if the payments for which credit is given were applied in discharge of the earlier items, the sum due for hauling would be paid.

ERLE, J.¹ I am of opinion that the rule should be made absolute. The first question is, whether the cause of action for carrying the defendant's timber from Swindon to London arose at Swindon. The carriage and delivery of the goods at their destination are the consideration for the promise to pay the hire or reward of the carrier; and, therefore, unless there was an express contract controlling the general rule, the plaintiff would have no legal demand for the price of the carriage until the timber was delivered in London. Then it was contended, that though, in respect of part of the 50*l.*, the cause of action was out of the jurisdiction of the Swindon county court, the cause of action in respect of 1*l.* 16*s.*, for hauling the timber to the wharf, was within the jurisdiction, and therefore a writ of prohibition ought not to issue. But the hauling was not a distinct cause of action; for if the plaintiff had hauled the timber to the wharf, and left it there, and not conveyed it to London, and had sued for hauling it, his demand would have failed. In order to support an action for it, an additional term in the contract was needed, namely, that in respect of the lots of timber to be carted, a cart and barge should be provided, and that 16*s.* per ton should be charged for carrying by the barge; and for hauling, what was reasonable.

CROMPTON, J. I am of the same opinion. I have no doubt that a carrier has no cause of action for the price of the carriage of goods, if he does not carry and deliver them. It is a different proposition that he is not obliged to take the goods without payment of the price for their carriage; and certainly he need not do so if he doubts the solvency of the party. Then, as regards the question whether a writ of prohibition should issue where part of the cause of action is within the jurisdiction, there is a good deal of difficulty in point of law. If the plaintiff had established that there was a separate contract for hauling, he might have recovered for those items. But the defendant must show a distinct cause of action within the jurisdiction of the county court; and, upon the whole, I think that is not made out. The course of dealing shows that it could not have been intended that the defendant should pay a small item in the account before the whole contract for carrying and delivering the timber had been performed.

Bovill asked that the rule should be made absolute with costs.

ERLE, J. It is not usual to give costs on issuing a writ of prohibition; besides, the second point was too much a matter of doubt to make the proceeding on the other side improper.

Rule absolute, without costs.

¹ LORD CAMPBELL, C. J., had left the court during the argument. COLERIDGE, J., was at the sittings in London.

BISHOP, surviving Executor, &c., v. CURTIS.¹

June 18, 1852.

*Legacy—Chose in Action—Right of suing upon—1 Vict. c. 26—
Prerogative—Forfeiture on Conviction for Felony.*

The Wills Act (1 Vict. c. 26), does not enable a testator to bequeathe a chose in action so as to pass the right of suing to the legatee.

Where a party, who is afterwards convicted of felony, is entitled to a chose in action, the right of suing being in another in trust for him, that right of suit does not vest in the crown upon the conviction.

To an action by the executor of E. C., deceased, on a promissory note made by the defendant, payable to E. C., on demand, the defendant pleaded that E. C., by his will (made after the passing of the 1 Vict. c. 26), bequeathed the note to C. C.; that the plaintiff assented to the bequest, whereby C. C. became entitled to the said note, and the money due thereon; and that whilst the said C. C. was so entitled, he was convicted of felony, by reason whereof he forfeited to the crown the said note, and all interest therein, and causes of action in respect thereof:—

Held, on general demurrer, that the plea was no answer to the action.

ASSUMPSIT. The first count was on a promissory note, made by the defendant for 1,000*l.*, payable on demand to E. Curtis, deceased.

Second plea, that after the making of the said promissory note, and the delivery thereof to the said E. Curtis, the said E. Curtis made his will, and thereby gave and bequeathed to his son, Charles Curtis, the said promissory note, but the payment thereof he, the said E. Curtis, by his said will, directed not to be demanded, or in any way made available, until his said son, C. Curtis, should attain the age of twenty-one years, and not then, if his sons, Edward and Charles, should agree to enter into copartnership, but if, on the contrary, a copartnership could not be agreed upon, then and in that case the payment of the said note might be enforced, but without interest which might have accrued due thereon; that the plaintiff proved the said will, and assented to the bequest of the said promissory note, whereupon and whereby the said C. Curtis then became and was entitled to the said promissory note, and the money due thereon; that whilst the said C. Curtis was so entitled to the said note, and the money due thereon, he, the said C. Curtis, was convicted of felony, and was sentenced to be transported for ten years; by reason of which said felony, and by force of the said judgment, the said C. Curtis forfeited to our lady the queen, the said promissory note and the money due thereon, and all interest thereon, and causes of action in respect thereof. Verification.

The plaintiff replied to this plea, merely setting out *verbatim* the probate of the will of E. Curtis, which appeared to be dated June 14, 1838, and concluded with a verification.

Special demurrer to the replication, and joinder in demurrer.

Maxwell, in support of the demurrer. The question is, whether the plea discloses a good defence to the action. First, by the will of E. Curtis, made since the passing of the Wills Act, 1 Vict. c. 26, the right of suing on this promissory note passed to C. Curtis. That act enables any person to bequeathe by will all personal estate which he is entitled to, either at law or in equity, at the time of his death, which, if not so bequeathed, would devolve upon his executor or administrator.

[LORD CAMPBELL, C. J. It does not make any kind of personalty bequeathable which was not so before, as it does as to realty.]

Section 1 defines personal estate as including debts and choses in action, which it places in the same category as chattels. A chose in action could formerly only have been assigned in equity, but now it may be passed by will. The right of suing on this promissory note is a chose in action, which, if not bequeathed, would devolve on the executor or administrator, and, therefore, it passes by the will.

[CROMPTON, J. According to that, it would vest in the legatee without any assent of the executor.]

The legatee would no doubt take this, as he would any chattel, subject to the paramount right of the executor to require it for the payment of debts. But the plea alleges that the executor assented, and so that point does not arise.

[CROMPTON, J. No; the assent would pass the property in the note, but not the right of suing upon it.]

The meaning of the Wills Act must be, that the legatee is to take all that the executor would take, that is, the right of property and the right of suing.

[COLERIDGE, J. How would the legatee have sued on the note?]

He would allege that by the bequest the right of suing passed to him, and show that the executors assented.

[LORD CAMPBELL, C. J. The will says the note is not to be put in suit until a certain time; would the legal right vest in the legatee in the interval?]

That must be the effect of the bequest. But, secondly, even if the right of suing on the note did not pass to Charles Curtis, still he had the equitable interest in it; and the crown took it on his conviction.

[LORD CAMPBELL, C. J. Is there any authority for that?]

In *Hawkins*, P. C. b. 2, c. 49, s. 9, it is said, "All things whatsoever which are comprehended under the notion of personal estate, whether they be in action or possession, which the party has in his own right, are liable to forfeiture; and so, a bond taken in another's name, or a lease made to another in trust for a person who is afterwards convicted of treason or felony, are as much liable to be forfeited as a bond made to him in his own name, or a lease in possession." *Bullock v. Dodds*, 2 B. & Ald. 258, decides that to an action on a bill of exchange the attainder of the plaintiff may be well pleaded. The prerogative of the crown extends so as to take the right of suing on this note, in which the convict was beneficially interested.

Hoggins, who appeared for the plaintiff, was not called upon to argue.

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LORD CAMPBELL, C. J. This plea is clearly bad. It is said that the property in and right of suing upon this promissory note passed to Charles Curtis by virtue of the 1 Vict. c. 26. It is admitted that before that act such property and right of suing would not have passed to a legatee. But that act never was intended to have any operation to make any thing bequeathable as personal estate which might not have been previously bequeathed. It only provides a mode for executing wills, and with respect to real estate a clause is introduced making things devisable which before were not so, such as rights of entry, which may now pass by will. But there is nothing to indicate an intention of enabling a party to bequeathe a chose in action so as to pass the right of suit. Therefore, before the conviction of Charles Curtis, it seems quite clear to me that the right of suing upon this note was in the executor, and not in Charles Curtis. Then, his conviction did not take that right out of the executor and vest it in the crown. The executor became a trustee for the crown in this note, but the interest of Charles Curtis did not pass to the crown.

COLERIDGE, J. The Wills Act does not extend the power of disposing by will, so as to change an equitable into a legal interest. Therefore, Charles Curtis must have sued on this note in the name of the executor, and the right of suing did not pass to the crown on his conviction.

ERLE, J. and CROMPTON, J. concurred.

Judgment for the plaintiff.

STEWART v. THE ANGLO-CALIFORNIAN GOLD MINING COMPANY.¹

June 18, 1852.

Joint-stock Company—Action by Scripholder—Right to sign Deed of Settlement—Forfeiture of Shares—Notice of Forfeiture.

The deed of settlement of a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, was executed by one fourth of the shareholders, and contained a clause providing that the shares of every subscriber who should not execute the deed within three months from its date should be forfeited, if the board of directors thought fit, and that the amount paid upon such shares should become the property of the company. Under this clause, the shares of a scripholder in the company, who had not applied to sign the deed within three months from its date, were declared forfeited, without any reasonable notice having been given, and a subsequent application to be allowed to sign was refused.

Held in an action for such refusal, and for not causing a certificate of proprietorship of the shares to be delivered to the plaintiff, that the clause of forfeiture could not be objected to as being *ultra vires* or unreasonable, and that as the deed did not require notice to be given

¹ 21 Law J. Rep. (N. S.) Q. B. 393.

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before forfeiture, no such notice was necessary; and, therefore, that after the forfeiture, the plaintiff's title to the shares ceased.

DECLARATION, that the defendants were a joint-stock company, completely registered under and in pursuance of the statute 7 & 8 Vict., intituled "An act for the Registration, Incorporation, and Regulation of Joint-stock Companies," and formed by a certain deed of settlement required according to the aforesaid statute to be executed by the shareholders of such company. And the plaintiff avers, that before and at the times of the committing the grievances hereinafter mentioned, to wit, &c., he, the plaintiff, became, and still was, entitled to 240 shares in the capital or joint-stock of the defendants; and also before and at the times of committing the grievances hereinafter stated, and after the defendants had completely registered under the said act of parliament, to wit, &c., the plaintiff being so entitled to the said shares as aforesaid, became and was entitled, under and by virtue of the aforesaid statute, to have made out by the defendants a certificate of the proprietorship of each of the before-mentioned shares, to which the plaintiff was so entitled as aforesaid, specifying therein, respectively, the share to which the plaintiff was entitled, and the amount paid up in respect of such share at the date of such certificate, and to have such certificate, with the common seal of the defendants affixed thereto, delivered to him on demand; and although, afterwards and before and at the time of the committing the grievances, and before the commencement of this suit, and whilst the plaintiff was so entitled as aforesaid, to wit, &c., he, the plaintiff, was ready and willing, and from thence had always been and continued to be ready and willing, to execute the deed of settlement under which the defendants as such company were formed as aforesaid, of which the defendants during all the time aforesaid had due notice, and were then requested by the plaintiff to suffer and permit the plaintiff to execute such deed of settlement; and although, also, after the plaintiff had become, and whilst he was entitled to the said shares as aforesaid, and before the committing of the grievances, to wit, &c., he, the plaintiff, did, pursuant to the said statute, demand of the defendants that the defendants should cause a certificate of the proprietorship of each of the before-mentioned shares to be delivered to him, the plaintiff, as holder and proprietor of such shares pursuant to the provisions of the said statute; yet the defendants, well knowing, &c., did not, nor would, although a reasonable time had elapsed, suffer or permit the plaintiff to execute such deed of settlement as aforesaid, but then wholly refused and continued to refuse to suffer or permit the plaintiff to execute such deed of settlement as aforesaid. That the defendants did not, nor would, on demand made by the plaintiff as aforesaid, or at any other time, cause a certificate of the proprietorship of each of the before-mentioned shares, or of any or either of them, to be delivered to the plaintiff as proprietor thereof; but the defendants, although often requested so to do, and although a reasonable time for making out and delivering such certificates as aforesaid had elapsed before the commencement of this suit, had wholly neglected and refused, and

still neglected and refused, to make out and deliver such certificate as aforesaid. Whereby, and by reason of the premises, the plaintiff had been ever since deprived of the evidence of his title as proprietor of his said shares, and of the power to receive any dividends or profits for and in respect of the said shares, and of the remedies and powers given by the said statute to shareholders. That the plaintiff hath also, by reason of the premises, been hitherto prevented from selling and disposing of the said shares, and from making and acquiring divers great gains and profits, amounting together to a large sum of money, to wit, &c., which might and otherwise would have accrued to him by the delivery to him of such certificates as aforesaid, and hath lost divers other great gains and profits, &c.

Pleas, amongst others, secondly, that the defendant did not become, nor was he entitled to the shares in the capital or joint stock of the defendants *modo et formâ*; thirdly, that the plaintiff did not become nor was entitled under the statute to have made out by the defendants a certificate of the proprietorship of each of the said shares, or to have such certificate, with the common seal of the defendants affixed thereto, delivered to the plaintiff on demand *modo et formâ*.

On the trial, before Lord Campbell, C. J., at the last Kent spring assizes, it appeared that the Anglo-Californian Gold Mining Company was provisionally registered in August, 1850, and a certificate of complete registration obtained on the 5th of November, 1851, under the 7 & 8 Vict. c. 110. In June, 1850, the plaintiff obtained scrip receipts for two hundred shares in the company. The deed of settlement of the company, dated the 16th of August, 1851, was executed by one fourth of the shareholders, and, amongst other stipulations, it contained a clause providing "that the share or shares of every subscriber for any part of the capital of the company, who shall not execute these presents within three months from the day of the date hereof, shall be forfeited, if the board of directors shall think fit, and the amount paid upon such share or shares shall become the property of the company." No request was made by the plaintiff to be allowed to execute the deed until after the expiration of three months from its date, and before such request was made, and after the lapse of the three months from the date of the deed, namely, on the 18th of November, 1851, the directors passed a resolution declaring that the scrip of all those persons who had not signed the deed of settlement was cancelled, and the deposit paid on such scrip forfeited. This resolution was confirmed at a subsequent meeting of the directors, on the 21st of November, 1851, and the seal of the company affixed to it. No previous notice requiring the plaintiff to come in and sign the deed, was proved to have been given to the plaintiff, until the day before the three months expired, and the subsequent application by the plaintiff to be allowed to sign the deed had been refused. A verdict was found for the plaintiff, for the value of the shares, the jury expressly finding that the notice to the plaintiff was not reasonably sufficient, but leave was reserved to the defendants to move to enter the verdict for them, and a rule *nisi* for that purpose was obtained in the following term; against which

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E. James, Paterson and J. Thompson (April 29) showed cause. First, the directors had no power to forfeit the plaintiff's shares, on the ground that he had failed to execute the deed of settlement. The inserting of the clause of forfeiture in the deed of settlement was *ultra vires* and void. By the 7th section of the 7 & 8 Vict. c. 110, by which the deed of settlement is rendered necessary, and its contents pointed out, there is no reference made to any such clause, and section 26 expressly enacts what the penalty shall be of omission on the part of a "shareholder" to execute the deed of settlement, and there, as in other sections of the act, "shareholder" is used as synonymous with "subscriber." The plaintiff would have been liable to pay calls though he had not signed the deed. In the case of *The Banwen Iron Company v. Barnett*, 8 Com. B. Rep. 406; s. c. 19 Law J. Rep. (N. S.) C. P. 17, there was an omission to insert a proper clause in the deed of settlement, and the shareholder there had signed the deed. That case, therefore, is distinguishable from the present. The case of *Ashpitel v. Sercombe*, 5 Exch. Rep. 147; s. c. 19 Law J. Rep. (N. S.) Exch. 82, is in point here. That case decides that a subscriber is not bound by a stipulation in the subscribers' agreement not warranted by the 7 & 8 Vict. c. 110, s. 23. Secondly, notice ought to have been given to the plaintiff a reasonable time before the forfeiture. The 58th section of the Joint-stock Banks Act, 7 & 8 Vict. c. 110, expressly requires a notice to be given twenty-one days at least before the forfeiture of any shares is declared, and three months' notice is required by the Railway Clauses Consolidation Act.

[LORD CAMPBELL, C. J. But this is under a clause in the deed of settlement.]

The forfeiture is to take place "if the directors think fit;" and upon every principle of law the plaintiff should have been informed of the intention of the directors to put in force their option. To make a person responsible in respect of a matter more particularly within the knowledge of another, notice should first be given; *Vyse v. Wakefield*, 6 Mee. & W. 442; s. c. 9 Law. J. Rep. (N. S.) Exch. 274; and this case falls within that principle. Further, the objection on the ground of forfeiture is not open on these pleadings; the forfeiture should have been specially pleaded.

[WIGHTMAN, J. If the shares were legally forfeited, then the plaintiff had no right or title to them. He was no longer possessed of them.]

Bramwell and Gray (May 5), in support of the rule. The question is, had the directors power to declare the shares forfeited?

[LORD CAMPBELL, C. J. Had they the power, and did they exercise it properly?]

They were not bound to give any notice. The 7 & 8 Vict. c. 110, shows what is the position of parties in such a company as this. The deed of settlement has been executed by one fourth of the subscribers and approved of by the registrar, and the provisions, therefore, are binding on all the subscribers. It is the duty of the promoters to prepare a reasonable deed, and if they do not, an action may be

brought against them to recover the deposits, or, perhaps, for not preparing a proper deed. *Ashpitel v. Sercombe*. In the present case the plaintiff might say, "You have obliged yourselves to prepare a proper deed, but you have not done so; and, therefore, I am entitled to have my money back." But this action is clearly not maintainable. The plaintiff was bound to inform himself of the contents of the deed.

[WIGHTMAN, J. It is said that he could not be compelled to sign a deed containing a clause of forfeiture which is unreasonable.]

CROMPTON, J. The statute declares that the deed shall not contain any thing inconsistent with law.]

In *Sparks v. The Liverpool Waterworks*, 13 Ves. 428, the court refused to grant any relief in a case where shares had been forfeited in consequence of the non-payment of a call after a lapse of ten days from the time of notice, though, by an accident, the plaintiff was not aware of the notice. It cannot be permitted that any person shall be allowed to canvass the provisions of the deed; if so, every shareholder may consider himself at liberty to question whatever clauses may be inserted, because individually he may consider them unreasonable. But this clause is really not an unreasonable one at all; the company do not undertake to give notice. If a shareholder refuses to sign, the company have no power to sue him for the refusal; and they must, therefore, have some power of forfeiture.

[LORD CAMPBELL, C. J. Some part of the deed may be invalid, though the rest is valid and binding.]

There was an undertaking to prepare a proper deed; and if that is not done, the plaintiff may canvass it by an action in another form. If the plaintiff chooses to sign the deed he must take it in its integrity, and the plaintiff has no right to object in this action to the clause. By section 66, execution may be issued against the person, property, and effects of any shareholder for the time being, upon judgments obtained against the company; and though all the other shareholders may have signed, yet because of a refusal to sign on account of this clause, no execution could be had against the plaintiff or his property under that section. It would be most inconvenient to say that a shareholder might withhold his signature for any length of time while all the rest are liable, and his only penalty be the loss of his dividend.

[LORD CAMPBELL, C. J. There may be a reasonable clause of forfeiture if they do not come in within a reasonable time after notice; but you must say that it is a reasonable one without any notice.]

All the parties must take notice of the deed. The contract is for its execution; and if any one chooses to insist upon his right to sign, he must take it as it is, and cannot object that there is a clause in it which he considers unreasonable. The plaintiff, therefore, not having signed the deed, and his shares being properly forfeited, is not a shareholder within the meaning of the interpretation clause; and, consequently, the defendants are entitled to the verdict.

Cur. adv. vult.

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The judgment of the court¹ was now delivered by

LORD CAMPBELL, C. J. In this case a rule was granted on the point reserved, whether there was evidence to prove that, before the plaintiff requested that he might be permitted to execute the deed of settlement, his shares in the company were duly forfeited; if they were, the defendants are entitled to have the verdict entered for them on the issue on the second plea, that the plaintiff was not possessed of the shares. It appeared that this company was provisionally registered in August, 1850; that in June, 1850, the plaintiff obtained certain scrip receipts for shares in the company; that the deed of settlement was completed and executed by one fourth of the shareholders, on the 16th of August, 1851; that it contained a clause which authorized the directors to declare forfeited the shares of any scripholders who should not execute the deed within three months from its date; that after the expiration of three months from the date of the deed, and before the plaintiff requested that he might be permitted to execute the deed, the directors declared his shares to be forfeited; that he had had no previous notice from the company to come in and sign the deed; that the company was completely registered in November, 1851, and that afterwards the company refused leave to the plaintiff to execute the deed, on the ground that his shares were forfeited. It was contended, before us, that this clause of forfeiture was unreasonable and void; and, at any rate, that it could not be acted upon against a subscriber or scripholder, till he had had notice of it, and had afterwards refused or neglected to execute the deed. But looking to the provisions of the 7 & 8 Vict. c. 110, and the nature of the undertakings which that statute was meant to regulate, we think that the shares were duly forfeited. There is, necessarily, authority given by all the subscribers to frame a deed; the company cannot act till it has a certificate of complete registration, and it cannot be completely registered unless it be "formed by a deed or writing, under the hand and seals of the shareholders, which must be signed by at least one fourth of the persons who at the date of the deed had become subscribers." This deed must likewise be submitted to the registrar of joint-stock companies, that it may be seen by him to be conformable to the statute, and in other respects unexceptionable. He may object that it is incomplete, or that it contains improper matter, and he must approve of it before the certificate of complete registration can issue. We conceive that no subscriber can ask to be allowed to execute the deed, and at the same time object to its contents. In the case of *Wilkinson v. The Anglo-Californian Gold Mining Company*, 21 Law J. Rep. (N. S.) Q. B. 327; s. c. 12 Eng. Rep. 444, we lately held that a subscriber could not partially execute a deed of settlement, excepting clauses which he objected to. If he executes it absolutely, he must be bound by it as far as it is not against the law of the land. This is an action for not being

¹ LORD CAMPBELL, C. J., WIGHTMAN, J., and CROMPTON, J.

Gage v. The Newmarket Railway Company.

permitted to execute the deed, and the plaintiff must be supposed to have availed himself of his opportunities of becoming acquainted with its contents, and to have sanctioned it as it stands. If the deed contained any thing contrary to the prospectus, or justly objectionable, he might possibly recover back the sums he has paid for his scrip from the individuals with whom he dealt; but, in the action against the company for not permitting him to execute the deed, he cannot object to it as unreasonable. Then, as to the want of notice; the evidence was that he had no notice till the day before the time expired, which the jury found not to be sufficient, and the case stands as if he had received no notice. But no notice is required to be given by the deed, which confers upon the directors the absolute power to declare forfeited the shares of the subscribers who do not execute it within three months from its date. Therefore, if the deed be valid, no notice was required. In truth, the subscribers had ample means of becoming acquainted with the peril which they ran of their shares being forfeited; but some of them may have delayed their application to execute the deed (an act which would render them liable for calls) till they saw that the concern was likely to be prosperous, and that shares were at a premium. In this action we thought that the plaintiff's title to shares, in the sense in which the word is used in the declaration, could not be denied on the ground that he had not executed the deed, and, therefore, could not be a shareholder within the definition of the term in the interpretation clause; but, as the shares were duly forfeited, the verdict on the second issue will be entered for the defendants.

Rule absolute to enter the verdict for the defendants on the second issue.

GAGE v. THE NEWMARKET RAILWAY COMPANY.¹

May 3, 1852.

Covenant — Construction — Railway Company — Agreement to pay Compensation in respect of Lands taken.

A railway company, who were promoting in parliament a bill for an extension of their line, which, if made, would pass through the lands of the plaintiff, covenanted with the plaintiff, "that in the event of the proposed bill passing in the then session of parliament, the company should, before they should enter upon any part of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion not exceeding forty-three acres, which the company might, under the powers of their act, require and take for the purposes of their undertaking; and that, in addition to purchase-money as aforesaid, the company should pay to the plaintiff, before they should enter upon any part of his said land, 7,100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands not exceeding forty-three acres to be taken by them:" —

¹ 21 Law J. Rep. (N. S.) Q. B. 398; 16 Jur. 1136.

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Held, that the company were not liable to pay either of these sums, unless they entered upon some part of the plaintiff's lands.

Held, also, that an absolute covenant to pay these sums to the plaintiff by the company would be *ultra vires* and void.

COVENANT. The declaration stated that, after the passing of "The Newmarket and Chesterford Railway Act, 1846," and before the passing of "The Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847," and also before the passing of "The Newmarket and Chesterford (Thetford Extension) Railway Act, 1847," to wit, on &c., by articles of agreement then made between the defendants, by their then style and title of "The Newmarket and Chesterford Railway Company" of the one part, and the plaintiff of the other part [profert], reciting that it was proposed by the Newmarket and Chesterford Railway Company to construct and maintain a railway from their railway at Newmarket, in the county of Cambridge, to Bury St. Edmunds, in the county of Suffolk, with a branch therefrom to the city of Ely; and for the purpose of carrying such proposal into effect, the said Newmarket and Chesterford Railway Company were then promoting a bill which had been introduced into the commons house of parliament and read a second time, intituled, "A bill to enable the Newmarket and Chesterford Railway Company to extend their line of railway to Bury St. Edmunds, with a branch to the city of Ely;" and that, according to the plans deposited with the clerks of the peace for the counties through which it was proposed to form the said railway, it appeared that, if made, it would pass through the lands of the plaintiff situate in, &c.; and that the plaintiff, being apprehensive that great injury would be done to his property if the said line of railway were to be made as in the said plans delineated, and more particularly if deviations were made therefrom in certain places to the extent of the limits of deviation marked on the said plans, had caused intimation of his intention to oppose the said bill to be given to the promoters thereof; and that the said company were desirous to come to an agreement with the plaintiff, upon the terms thereafter expressed; the said company, for the considerations therein mentioned, did covenant and agree with the plaintiff that, in the event of the said bill thereinbefore recited as hereinbefore mentioned, and then before parliament, being passed in the then present session of parliament, the said company should and would, within a reasonable time in that behalf after the passing of the said bill, and before the said company should enter upon any part of the lands of the plaintiff situate in the said county of Suffolk, pay to the plaintiff, his heirs or assigns, the sum of 4,900*l.* purchase-money, for any portion of his lands, not exceeding forty-three acres, which the said company might, under the powers of their act, require and take for the purposes of their undertaking. And further, that in addition to such purchase-money as aforesaid, the said company should and would, within a reasonable time in that behalf after the passing of the said bill, and before they should enter upon any part of the said lands, pay to the plaintiff, his heirs or assigns, the sum of 7,100*l.* as landlord's compensation for the damage arising to his estate by the

severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them; and that the company should at their own expense settle all claims and demands which the plaintiff's tenants might be entitled to make or demand in consequence of the said undertaking. Averment, that the said company, after the passing of the said act of parliament firstly above mentioned, to wit, on &c., did make and construct the railway and works by the said last-mentioned act authorized to be made, and that the said bill in the said articles of agreement mentioned as aforesaid, did pass and became law in the session of parliament present at the time of making the said articles of agreement, to wit, on &c., and became and was in that session and is "The Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847," above mentioned; and that the plaintiff always from the time of making the said articles of agreement was ready and willing to accept and receive from the defendants the said sum of 4,900*l.* as the purchase-money for any portion of his, the plaintiff's, said lands in the said articles of agreement in that behalf mentioned as aforesaid, not exceeding forty-three acres, which the defendants might, under the powers of their last-mentioned act, require and take for the purposes of their undertaking in and by the same act authorized; and that the plaintiff was always from the time of making the said articles of agreement ready and willing to accept and receive from the defendants, in addition to the said purchase-money, the said sum of 7,100*l.* in the said articles of agreement in that behalf mentioned as aforesaid, as landlord's compensation for the damage arising and to arise to the plaintiff's estate in the said articles of agreement in that behalf mentioned, by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them according to the true intent and meaning of the said articles of agreement; and that a reasonable time after the passing of the last-mentioned act, for the defendants to pay to the plaintiff the said two sums of money above mentioned respectively, had elapsed before the commencement of this suit; and that the plaintiff was always from the time of making the said articles of agreement ready and willing, and able to convey and assure to the defendants all such portions of his said lands in the said articles of agreement in that behalf mentioned as aforesaid, not exceeding forty-three acres, as the defendants might, under the powers of the last-mentioned act, require and take for the purpose of their said undertaking by the same act authorized; of all which premises the defendants, after the making of the said articles of agreement, to wit, on &c., and always from that time until the commencement of this suit, had notice; and that the defendants, after the passing of the last-mentioned act, and before the commencement of this suit, to wit, on &c., were requested by the plaintiff to pay to him the said two sums of money respectively; and that the plaintiff, after the passing of the last-mentioned act, and before the commencement of the suit, to wit, on &c., did give notice to the said defendants that he, the plaintiff, was ready and willing to convey and assure, and did then offer to convey and assure to the defendants all and every such portion and portions of his said lands in the said articles of

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agreement in that behalf mentioned, not exceeding forty-three acres, as they, the said defendants, might, under the powers of the last-mentioned act, require and take for the purposes of their said undertaking by the same act authorized; and that a reasonable time for the said company to select and take such portions of the plaintiff's said lands for the purposes in that behalf aforesaid before the commencement of this suit had elapsed; yet the defendants had not paid to the plaintiff the said two sums of money, or either of them, or any part thereof, &c.

The defendants set out the articles of agreement upon oyer, which, after reciting as is stated in the declaration, contained the following covenant on the part of the defendants:—"That in the event of the bill hereinbefore mentioned being passed in the present session of parliament, the said company shall, before they shall enter upon any part of the lands of the said Sir Thomas Rokewood Gage, in the said county of Suffolk, pay to the said Sir T. R. Gage, his heirs, or assigns, the sum of 4,900*l.* purchase-money for any portion of his lands, not exceeding forty-three acres, which the said company may, under the powers of their act, require and take for the purposes of their undertaking; that in addition to purchase-money as aforesaid, the said company shall pay to the said Sir T. R. Gage, his heirs or assigns, before they shall enter upon any part of the said land, the sum of 7,100*l.*, as landlord's compensation, for the damage arising to his estate by the severance thereof in respect of the lands, not exceeding forty-three acres, to be taken by them." The defendants then pleaded that the extended line of railway and works mentioned in the said articles of agreement, and in the "Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847," and thereby authorized to be made, had not, nor had any part thereof, been made or constructed, or begun to be made or constructed; and that the defendants had not required or taken for the purposes of their said undertaking, or otherwise, any part of the plaintiff's said lands in the said agreement mentioned, or any lands or tenements of the plaintiff whatsoever, nor had they, the defendants, ever given any notice of requiring or taking any of the said lands in the said articles of agreement mentioned, or any lands or tenements of the plaintiff, nor had they ever agreed with the plaintiff, or any person or persons, for the purchase or taking of any such lands or tenements as aforesaid, otherwise than by the said articles of agreement.

General demurrer and joinder in demurrer.

J. Addison, in support of the demurrer.¹ The question is, whether the taking of the land was a condition precedent to the performance of the defendants' covenant. If it be not, the declaration is good and the plea bad. The general principle as to what is to be considered a condition precedent is laid down in *Portage v. Cole*, 1 Wms. Saund. 320. Here there are two considerations:—one, the passing of the

¹ April 27, before LORD CAMPBELL, C. J., WIGHTMAN, J., ERLE, J., and CROMPTON, J.

bill, has been received, and the other is, the giving up of the land by the plaintiff, which the plaintiff is bound to do when required; but the company are now bound to pay for it. The expiration, by lapse of time, of the powers given to a railway company, does not affect their obligation to take land. *Webb v. The Direct London and Portsmouth Railway Company*, 9 Hare, 129; s. c. 5 Eng. Rep. 151. He referred also to *Pilbrow v. Pilbrow's Atmospheric Railway, &c. Company*, 5 Com. B. Rep. 440; s. c. 17 Law J. Rep. (n. s.) C. P. 166. Except for the words "before they shall enter" on the lands, no question would arise here; but upon the whole language of the covenant, it was plainly intended that the company should make the railway, and for five years they have control over forty-three acres of the plaintiff's land. At the end of three years the plaintiff could not have said that the company should no longer hold the land. The answer would have been, that the company had five years for the exercise of their powers. *Bland v. Crowley*, 6 Exch. Rep. 522; s. c. 4 Eng. Rep. 441, bears strongly on the present case. There the breaches alleged were in respect of the non-payment both of the stipulated price per acre of the plaintiff's land, and of a sum of 3,000*l.* for general damage; and as regards the right to recover the latter sum immediately after the passing of the company's act, the decision is in point here.

[CROMPTON, J. In that case, I think, there was no qualified covenant.]

But the case of *Preston v. The Liverpool and Manchester Junction Railway Company*, 1 Sim. (n. s.) 586; s. c. 7 Eng. Rep. 124, applies strictly to this case, and the observations of the Vice-Chancellor in giving judgment establish that the reasonable construction of this contract is that stated in the declaration. Payment was to be made within a reasonable time, whether the company entered upon the land or not, but at all events before they entered.

[LORD CAMPBELL, C. J. Were there the same terms used in *Preston v. The Liverpool and Manchester Junction Railway Company* ?]

No; but there were in *Webb v. The Direct London and Portsmouth Railway Company*. The stipulation as to the company not entering upon the land is a condition in the plaintiff's favor.

Bramwell, contra. The powers of the company to enter upon the land are gone, and until the capital was subscribed for, they could not exercise their compulsory powers. The agreement, as it is sought to be construed by the plaintiff, is most improbable and unreasonable.

[WIGHTMAN, J. Suppose the company took a single square yard, or suppose they only skirted the land ?]

In the latter case the company would not be bound to pay a farthing. But the terms of the contract itself must be looked at; and according to them, the land must be taken before any money can become due. In *The Marquis of Salisbury v. The Great Northern Railway Company*, 21 Law J. Rep. (n. s.) Q. B. 185; s. c. 10 Eng. Rep. 344, it was held, that a notice to take land was such an exercise of the compulsory powers of the company as enabled them to take steps to assess compensation after the expiration of the prescribed period.

But the Lands Clauses Consolidation Act, by section 84, for which this agreement is a substitution, does not oblige the money to be paid to the landowner until his land is actually entered upon. The plaintiff clearly intended to guard against his land being entered upon before payment, and he is consequently not entitled to his money before entry. The only obligation to pay is one which arises upon entry, and not before.

[LORD CAMPBELL, C. J. The railway might have been injurious to the plaintiff without actually touching his land, and his not opposing the scheme might have been the consideration for the promoters paying this money.]

That is not what is provided for. Besides the purchase-money for land actually taken, the damage which is to be paid for is that which arises from severance; so that it is plain that it was contemplated throughout that the plaintiff's land would be actually taken. *Bland v. Crowley* is in favor of the defendants. The reasoning of Parke, B., there shows that the breach here is not sustained. The case of *Webb v. The Direct Portsmouth Railway Company*, has been much shaken when it was before the Lords Justices of Appeal. 21 Law J. Rep. (N. S.) Chanc. 337; s. c. 9 Eng. Rep. 249. Lord Cranworth puts it that the contract (if, indeed, any at all existed) on the part of the defendants is to purchase the land, in which event alone the money will become due; if that be so, the action should have been for not accepting a conveyance. The contract to pay is only contingent upon the plaintiff's land being entered upon. In *Stuart v. The London and Northwestern Railway Company*, 21 Law J. Rep. (N. S.) Chanc. 450; s. c. 11 Eng. Rep. 112, which was an appeal from the Master of the Rolls, the lords justices expressed the same opinion as in *Webb v. The Direct London and Portsmouth Railway Company*, but sent a case for the opinion of a court of law. But, secondly, the declaration is bad. It alleges a promise to pay in a reasonable time, and that has not elapsed before the last moment at which the defendants could enter.

[CROMPTON, J. It is alleged that a reasonable time for the payment of the money has elapsed.]

Next, this agreement is unlawful and cannot be enforced. The defendants were originally incorporated for the purpose of making a railway from Newmarket to Chesterford, and they had no power to enter into an agreement to pay money for land which they would then not require.

[LORD CAMPBELL, C. J. When the Extension Act passed they had power to take the plaintiff's land.]

Still, the agreement which was made before that act passed was *ultra vires* and void, and cannot be rendered valid by what occurred subsequently.

[LORD CAMPBELL, C. J. In *Lord Howden v. Simpson*, 10 Ad. & E. 793; s. c. 8 Law J. Rep. (N. S.) Exch. 281, the agreement was made before the bill passed.]

In that, and all the cases cited for the plaintiff, the agreement was made with an individual, which was afterwards sanctioned by the company. *The East Anglian Railways Company v. The Eastern Coun-*

ties Railway Company, 21 Law J. Rep. (N. S.) C. P. 23; s. c. 7 Eng. Rep. 505, and the 8 Vict. c. 18, s. 65, were also referred to by him.

J. Addison, in reply. The case last cited does not apply; as there the contract was quite out of the scope of the powers of the company.

[*LORD CAMPBELL*, C. J. How could this be a fit appropriation of the funds, if the defendants are to be liable although they do not enter?]

It might be most expedient for the purposes of their act to enter into such a contract as this. They were buying powers to enter upon and take land which they might or might not ultimately require. The defendants rely on the analogy of the Lands Clauses Consolidation Act; but under that statute (sect. 84,) the company would be liable to be sued on their agreement, or on the award, although they had not entered. So here, the money is to be paid absolutely within a reasonable time, irrespective of there being any entry upon the land.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. We are of opinion that the defendants are entitled to our judgment. Taking the deed as set out on oyer, we think that there is no breach well assigned upon it. The covenant there (without saying any thing as the declaration does about "reasonable time") is merely in these words: "That in the event of the bill hereinbefore mentioned being passed in the present session of parliament, the said company shall, before they shall enter upon any part of the lands of the said Sir Thomas Rokewood Gage, in the said county of Suffolk, pay to the said Sir T. R. Gage, his heirs or assigns, the sum of 4,900*l.* purchase-money for any portion of his lands, not exceeding forty-three acres, which the said company may, under the powers of their act, require and take for the purposes of their undertaking; that in addition to purchase-money, as aforesaid, the said company shall pay to the said Sir T. R. Gage, his heirs and assigns, before they shall enter upon any part of the said land, the sum of 7,100*l.* as a landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them." The question we have to determine is whether, the company never having entered upon any part of the plaintiff's lands, he is now entitled to sue for these two sums, or either of them? The 4,900*l.* is declared to be the purchase-money for the land to be required and taken; and the only time of payment mentioned is before the company enter on the land. Therefore, if no land is required or taken, and the company never enter on any part of the land, there seems great difficulty in saying that there has been a breach of covenant in not paying the money. So, the 7,100*l.* is declared to be a compensation for severance of the land taken from the rest of the plaintiff's land, and the same time of pay-

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ment is defined. But there has been no severance to be compensated, and the time for payment has not arrived. The deed does not bargain for a sum of money to be paid absolutely by the company to the plaintiff as a consideration for his withdrawing his opposition to the bill, but provides a peculiar mode of estimating the value of the land to be taken, and of the compensation to be made for severance-damage, instead of the modes pointed out by the general acts upon this subject. We, therefore, do not think that the company can be considered as having absolutely covenanted to pay 12,000*l.* to the plaintiff in a reasonable time after the passing of the act. If this deed could bear such a construction, we should have thought it so far *ultra vires* and void. Here the railway company are the covenantors; and if the present action lies, the capital paid up by the shareholders must be answerable for the damages to be recovered. We consider that this would be a misappropriation of the funds of the company, which the directors could not lawfully make. All the cases relied upon by the plaintiff's counsel are clearly distinguished from the present, except, *Webb v. The London and Portsmouth Railway Company*, before Vice-Chancellor Turner. Notwithstanding our high respect for that learned judge, we cannot concur in the reasons for his decision; and although it has not been expressly overturned, its authority was greatly shaken when it came before the Lords Justices of Appeal. We do not feel it necessary to give any opinion upon the case of *Bland v. Crowley*, in which the learned judges of the Court of Exchequer were divided, as the deed there discussed varies materially from the present. Nor would it be proper to give any opinion upon *Stuart v. The London and Northwestern Railway Company*, as we learn that when it came before the Lords Justices of Appeal it was sent by them to be decided in a court of law. We are happy to think that the question in this case being on the record, it may be brought before a court of error. In the meanwhile, there must be

Judgment for the defendants.

TIMMIS and Wife v. GIBBINS, Public Officer, &c.¹

June 3, 1852.

Money lent — Money had and received — Deposit of worthless Security — Failure of Consideration.

M. W. deposited certain country bank notes, payable in London, representing 80*l.* in value, with a banking company, and received the following memorandum, signed by the manager: — "Received of M. W. 80*l.*, for which we are accountable. 80*l.*, at 3*l.* per cent. interest, with fourteen days notice." The notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and

¹ 21 Law J. Rep. (N. S.) Q. B. 403.

refused payment. They were retransmitted by that night's post to the banking company, who on the following day gave notice of dishonor to M. W., and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M. W. made the deposit with the banking company, but that neither M. W. nor the banking company were then aware of this.

Held, that, under the above circumstances, M. W. could not maintain an action, either for money lent or for money had and received, against the banking company.

DEBT, for money lent by the female plaintiff *dum sola*, to the defendant, as public officer of the Birmingham Banking Company, for money had and received by the defendant, as such public officer, for the use of the female plaintiff *dum sola*, and on an account stated between her *dum sola* and the defendant, as such public officer, &c.

Plea. Never indebted.

There was another issue, upon which the jury were discharged by consent.

At the trial, before Wightman, J., at the Staffordshire spring assizes, 1852, it appeared that the action was brought against the defendant, as public officer of the Birmingham Banking Company, under the following circumstances:—The female plaintiff being possessed of certain notes of the Stourbridge Bank, amounting to 80*l.*, which were payable there or at Messrs. Glyn & Co.'s, London, on the 26th of June, 1851, before her marriage, deposited them at the branch of the Birmingham Banking Company at Dudley, and received the following memorandum, signed by the manager of that branch bank:—

"Received of Mary Weal 80*l.*, for which we are accountable. For the directors and proprietors of the Birmingham Banking Company. R. H. Smith, manager.

"80*l.*, at 3*l.* per cent. interest, with fourteen days' notice."

These notes were, on the evening of the 26th of June, sent from Dudley, by post, to Messrs. Jones, Loyd & Co., the London agents of the Birmingham Banking Company, and were by them presented, on the 27th, at Messrs. Glyn & Co.'s bank, in London, and refused payment. They were re-transmitted by that night's post to the Birmingham Banking Company, who, on the following day, the 28th, gave notice of their dishonor to the female plaintiff, and tendered her the notes, which she refused to receive. The Stourbridge bank stopped payment on the 26th, and never opened after that day, but neither party was aware of this at the time of the deposit. Dudley is about five miles from Stourbridge. Upon these facts, the learned judge directed the verdict to be entered for the defendant, subject to leave to enter the verdict for the plaintiff if the court should be of opinion that the banking company were liable. A rule *nisi* having accordingly been obtained,—

Alexander and *Chance* now showed cause. The banking company are not liable, under these circumstances, to pay the amount of the notes. This was a bargain, the consideration for which has failed, and there being no laches on the part of the defendant, the plaintiffs cannot recover. In *Camidge v. Allenby*, 6 B. & C. 373; s. c. 5 Law J. Rep. K. B. 95, which was cited at *Nisi Prius*, there was laches,

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as the notes were never presented for payment, and the decision proceeded on that ground. *Rogers v. Langford*, 1 Cr. & M. 637, and *Turner v. Stones*, 1 Dowl. & L. P. C. 122; s. c. 12 Law J. Rep. (N. S.) Q. B. 303, turned on the same objection. It may be said that, as the deposit was only repayable on fourteen days' notice, the banking company took upon themselves all risk of the notes turning out worthless; but it is clear that the word "accountable" is used subject to its being ascertained that they were valid securities.

Keating and *Gray*, in support of the rule. Where a note, payable to bearer, is received as cash, and it afterwards turns out to be valueless, the risk falls upon the party receiving it, unless he has before indorsed it away for value.

[LORD CAMPBELL, C. J. If it is payable to bearer, I cannot see what difference the indorsement can make.]

It is so laid down by the judges in *Camidge v. Allenby*.

[LORD CAMPBELL, C. J. You make no distinction between a party with whom notes are deposited, and a creditor to whom they are paid in discharge of an antecedent debt.]

This is in fact a purchase of the notes by the banking company.

It is quite clear that the plaintiffs could under no circumstances be entitled to recover back the very notes delivered to the banking company. Bull. N. P. 277, and *The Bank of England v. Newman*, 1 Ld. Raym. 442, were referred to.

[WIGHTMAN, J. This is, if any thing, money had and received. But as no money has been in fact received, there is no consideration for the implied promise.]

The notes are what they purported to be, notes of the Stourbridge Bank, and they were received and treated as money. If they had been taken merely as negotiable securities a question of laches might arise, but no such question can arise where they are treated as cash.

[LORD CAMPBELL, C. J. If, without fraud, I go to a banker's, and ask for cash for a note of a bank long since stopped, what is the state of things?]

There would probably be a warranty that the note was worth what it purports to be, and so the party bringing it would bear the loss. There is a difference taken in the cases between negotiable securities, paid for goods sold at the time and for an antecedent debt. *Ward v. Evans*, 2 Ld. Raym. 928, *Pott v. Clegg*, 16 Mee. & W. 321; s. c. 16 Law J. Rep. (N. S.) Exch. 210. This is in fact a discounting of the notes.

[LORD CAMPBELL, C. J. I cannot see how this differs from the ordinary case of a worthless note, paid in to a banker's, to be drawn out by check in the usual way.]

Here there is an agreement to take the notes as money, and a specific contract that the amount is not to be called for under fourteen days.

LORD CAMPBELL, C. J. I am of opinion that this action cannot be maintained either for money lent or for money had and received to the use of the plaintiffs. No doubt, both parties at the time of

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the deposit believed these notes to be valuable securities, and that the Stourbridge Bank was solvent. This, however, turned out not to be the case, and the notes were, in fact, of no value whatever. No laches can be imputed to the Birmingham Banking Company, because they immediately sent the notes to London, and after they were returned to them dishonored, they gave notice of the dishonor to the female plaintiff. The case is just the same as if the maker of these notes had been insolvent long before, and neither party had been aware of it. It could not be said that either of these counts could have been supported under such circumstances. There was a complete failure of the consideration upon which the defendant's promise was founded. But it is argued that you can resolve the transaction into a sale of a negotiable instrument, and that the maxim *caveat emptor* applies; but it is impossible here to say that there was any sale. All that was intended was a deposit to be repaid, not immediately, but on fourteen days' notice. No money was, in truth, deposited, but only this security, which has turned out to be worthless. The proposition contended for cannot be supported, that there is any general rule, that where bank notes are paid, they are always paid at the risk of the party receiving them, except where they are paid in respect of an antecedent debt. As I put it in the course of the argument, if I go to get change for a note, and it turns out that the bank issuing it has stopped payment, it is admitted that the loss would fall on the party asking for the change. I feel great difficulty in seeing any distinction between payment for goods sold at the time, and payment for them at a future day. In both cases it is a transaction of buying and selling; and even where the money is paid over the counter there must be some interval during which the buyer was a debtor. But on that point it is not necessary to give any decided opinion. I think the consideration for the defendant's promise has wholly failed, and that the plaintiffs have no cause of action.

COLERIDGE, J. In this case we must lay out of consideration any question of fraud on the part of the plaintiffs, or laches on that of the defendant. The sole point is, who is to bear the loss? In justice it should be the plaintiffs. The wife brought to the defendant what she represented as so much money's worth, and it has turned out not to be of any value. Why, then, is the defendant to suffer? This is the common sense view of the question, and the law is quite in accordance with it. There is a general rule, that a party paying money in ignorance of a fact may recover it back as money had and received to his use. And in like manner, if a party makes a promise under a mistake of fact, the consideration for his promise fails. Here, there was a representation that these notes were money's worth? I do not go so far as to say there was any warranty that they were so. The defendant accepted them as money, and gave a receipt for them as such, and it afterwards turned out that this was an error. Whether the plaintiffs rely upon one count or the other, they are bound to show that money was actually lent to or received by the defendant. *Prima facie* they do this by putting in the receipt, but it turns out

that it was given under a mistake of fact. Surely the defendant must be at liberty to show that this is so, and that no money was ever received by him, and so to answer the *prima facie* case of the plaintiffs.

WIGHTMAN, J. I entertain the same opinion now as I did at the trial, that the plaintiffs can recover on neither count. The count for money had and received, supposing the plaintiffs entitled to succeed at all, would be the one most applicable to the case. The female plaintiff proposed to deposit a sum of money with the banking company upon receiving an accountable receipt for it. At that time it was assumed, by both parties, that these notes were of the value which they purported to be, and on that footing the banking company agreed to be accountable for the sum specified in the receipt. It, however, turned out that the notes were not of that value; indeed, they were of no value at all, and that without any fault on the part of the banking company. The promise, therefore, which would have been implied on their part, wholly failed. On the ground, therefore, of failure of consideration, this action cannot be supported, and the case differs entirely from that cited, where the bill was purchased, because here there was nothing in the shape of a purchase. Many of the cases cited have no direct application to the question before us. Nice distinctions have been suggested, whether, when a debt is paid by paper money, which turns out to be valueless, the party receiving it can recover upon the original consideration, and it has been said that he can if the payment is made in consideration of a precedent debt, but that it is different where it is the case of money paid over the counter upon a present sale. In that case it is looked upon as a sale, and the doctrine of *caveat emptor* applies. It is not necessary to decide that point, as here there was no sale at all and no debt between the parties.

*Rule discharged.*¹

¹ In America the question has often arisen, whether the payment of a debt, in bank bills, of a bank which had at the time of such payment actually failed and become insolvent, but which was unknown to both parties, is a good payment or not. The cases are not entirely harmonious on the subject, but the weight of authority seems to be, that such a payment is not a valid discharge of the debt. *Wainwright v. Webster*, 11 Vermont, 576, (1839); *Gilman v. Peck*, 11 Vermont, 516, (1839); *Fogg v. Sawyer*, 9 New Hampshire, 365, (1838); *Lighbody v. Ontario Bank*, 11 Wendell, 1, (1833); affirmed on error, 13 Wendell, 101, (1834); *Frontier Bank v. Morse*, 22 Maine, 88, (1842); *Contrá, Bayard v. Shunk*, 1 Watts & Sergeant, 92, (1841); *Scruggs v. Gass*, 8 Yerger, 175, (1835); *Lowrey v. Murrell*, 2 Porter, 280, (1835).

Perhaps these last cases may be sus-

tained, on the ground that the identical bills paid were received as payment, *per se*, whether they were good or bad; if not, they are in conflict with the current of authority. The same general principles apply to a payment made in counterfeit bills or coin. *United States Bank v. Bank of Georgia*, 10 Wheaton, 333, (1825); *Markle v. Hatfield*, 2 Johnson, 455, (1807); *Thomas v. Todd*, 6 Hill, (N. Y.) 340, (1844); *Hargrave v. Dusenberry*, 2 Hawks, 326, (1823); *Anderson v. Hawkins*, 3 Hawks, 568, (1825); *Pindall v. Northwestern Bank*, 7 Leigh, 617, (1836); *Mudd v. Reeves*, 2 Harris & Johnson, 368, (1808); *Wilson v. Alexander*, 3 Scammon, 392, (1842); *Eagle Bank v. Smith*, 5 Connecticut, 71, (1823); *Young v. Adams*, 6 Massachusetts, 182, (1810); *Simms v. Clarke*, 11 Illinois, 137, (1849). But such bill must be returned to the party paying in a reasonable time.

Bateman v. Bluck.

BATEMAN v. BLUCK.¹

June 10 and 18, 1852.

Highway — Thoroughfare — Right to remove Obstruction — Necessity to use Way obstructed — Pleading.

A public highway may, in point of law, exist over a place which is not a thoroughfare.

To a declaration in trespass for entering the plaintiff's close and pulling down a wall there, the defendant pleaded that the close in question was a paved public place, within the meaning of the Metropolitan Paving Act (57 Geo. 3, c. 29), and that the plaintiff had unlawfully, and contrary to the provisions of the said act, erected thereon the said wall; and because the said wall, at the said time when, &c., remained incumbering the said public pavement, and because the plaintiff, upon the request of the defendant, refused to remove the same, the defendant entered upon the said close and pulled down the said wall:—

Held, (after verdict for the defendant) that the plea was bad, as it did not show any necessity for the defendant's using the portion of the pavement obstructed by the wall, or that it interfered with the exercise of his right of passage.

TRESPASS for breaking and entering a close of the plaintiff, in the parish of St. Sepulchre, in the county of Middlesex, and pulling down and destroying a wall of the plaintiff there.

Pleas — First, not guilty; second, that the said close in which, &c., and the said wall, were not, nor was either of them, the close or wall of the plaintiff.

Third plea, that the said parish of St. Sepulchre was, before and at the time of the passing of the 57 Geo. 3, c. 29, (Metropolitan Paving Act), a part of the metropolis included within the weekly bills of mortality, and that the said close in which, &c., at the said time when, &c., was a paved public place within the true intent and meaning, and subject to the provisions of the said act, that is to say, a public footway pavement, which had been and then was paved, cleansed, and lighted by and under the authority of the commissioners for the time being, appointed and acting under and in pursuance of a certain other act of parliament (12 Geo. 3, c. 68), and that the said close in which, &c., was not at the said time when, &c., nor was any part thereof, a turnpike road or any part of any turnpike road; and that just before the said time when, &c., the plaintiff had, contrary to, and in violation of, the provisions of the first-mentioned act, unlawfully laid in and upon the said public footway pavement divers bricks and divers quantities of mortar and rubbish, and had therewith formed and constructed in and upon the said pavement the wall in the declaration mentioned; and because at the said time when, &c., the said wall remained and continued on and incumbering the said public pavement, and because the plaintiff then, upon the reasonable request of the defendant, refused to remove the same, the defendant, at the said time when, &c., entered upon the said close in which, &c., for the

¹ 21 Law J. Rep. (N. S.) Q. B. 406.

purpose of pulling down, and did then pull down the said wall, and removed the bricks and other materials thereof to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage; *quæ est eadem*, &c.

Fourth plea, that before and at the said time when, &c., there was, and of right ought to have been, into, through, over, and along the said close in which, &c., a public and common highway for all the queen's subjects to go, return, &c., on foot, at their own will and pleasure, and that the defendant was possessed of a dwelling house abutting on and having a door opening into the said highway; and because the plaintiff had wrongfully erected in and upon the said highway the said wall, so near to the said door of the defendant as to obstruct the same, so that the defendant could not, without prostrating the said wall, pass along the said highway into and from his said house; and because the plaintiff refused upon reasonable request of the defendant, then made in that behalf, to remove the said wall, the defendant entered upon the said close in which, &c., for the purpose of pulling down and did pull down the said wall.

The plaintiff joined issue on the first and second pleas, and to the third plea replied that the said close in which, &c., was not at the said time when, &c., a paved public place within the true intent and meaning of the said act; and to the fourth plea traversed the existence of a highway over the said close in which, &c., on which replications issues were joined.

At the trial before Coleridge, J., at the sittings at Westminster, in Easter term, 1852, it appeared that the *locus in quo* was a passage leading from the public street up to a court, called Hat and Mitre Court, in the parish of St. Sepulchre, of which the plaintiff was the owner, and which consisted of fourteen or fifteen houses. There was no thoroughfare through the court. The defendant had a house abutting on this passage, into which a doorway had been opened by the defendant. The plaintiff required the defendant to block up this door, which he refused to do, and consequently the plaintiff directed a wall to be built in the court so as to block up the defendant's doorway. This wall the defendant knocked down while it was being erected, which was the trespass complained of. The wall was erected on the pavement of the passage, which had been paved at the request of the plaintiff, by the commissioners, under the local act for paving the parish of St. Sepulchre, and it had always been lighted by the parish. It was objected, for the plaintiff, that the third and fourth pleas were not proved, because this court and passage were not such a public place as was contemplated by the Metropolitan Paving Act, and that not being a thoroughfare it could not be a highway. The learned judge was of opinion that these two pleas were proved, and a verdict was entered for the plaintiff on the first issue, and on so much of the second issue as related to the wall, and for the defendant on the residue of the second issue, and on the third and fourth issues; leave being reserved to the plaintiff to move to enter the verdict on the third and fourth issues, if the court should be of opinion that they were not proved by the defendant.

A rule *nisi* to enter the verdict accordingly, and also for judgment *non obstante veredicto* on the third plea, having been obtained,—

Montague Chambers and *Lush* now showed cause. First, as to the objection that this cannot be a highway because there is no thoroughfare. This point has never been solemnly decided; but, in *The Trustees of the Rugby Charity v. Merryweather*, 11 East, 375, n., Lord Kenyon expressed an opinion that it makes no difference in this respect that a place is not a thoroughfare, if the public have been permitted to use it. "If it were otherwise," he says, "in such a great town as this, it would be a trap to make people trespassers." In *Woodyer v. Hadden*, 5 Taunt. 125, Chambre, J., refers to that decision, having been counsel in the cause, and states that it was acquiesced in, and shows the great mischief which would arise from holding otherwise.

[LORD CAMPBELL, C. J. If a way is not used in exercise of a right of passage, what use can the public make of it?]

In *Wood v. Veal*, 5 B. & Ald. 454, Abbott, C. J., intimated that there can be no public highway which is not a thoroughfare, because the public at large cannot well be in the use of it. But they may acquire the right of going over the soil at their free will and pleasure, although they do not pass through the *locus in quo*. Then, as to the third plea. The jury have found that this is a public place within the meaning of the Metropolitan Paving Act. But it is objected that the plaintiff is entitled to judgment, notwithstanding this verdict, because a private person has no right to abate an obstruction in a public highway, unless it interferes with him in passing along it; and *Dimes v. Petley*, 15 Q. B. Rep. 276; s. c. 19 Law J. Rep. (n. s.) Q. B. 449, was cited for this. But that case is very different. It was an action for negligence in navigating a vessel on the Thames, and damaging the plaintiff's jetty, which projected into the river; and it not being shown that there was any necessity for the defendant to navigate his vessel over that part of the river where the nuisance existed, the plea was held bad. But here there was a request to the plaintiff to remove the obstruction, and that not having been done, the defendant had a right to pull it down. The Metropolitan Paving Act, 57 Geo. 3, c. 29, s. 65, makes a special provision for the protection of public places within that act.

[LORD CAMPBELL, C. J. It imposes a penalty; but does it, therefore, enable an individual to take the law into his own hands? A party can only abate an obstruction so far as is necessary to enable him to exercise his own right. Here your plea does not connect the defendant's house with the way, or show that there was any necessity for him to use it.]

A permanent obstruction, such as this, must necessarily be an obstruction to passengers; and the defendant, as one of the public, had a right to use the way, and consequently had a right to remove the obstruction.

Garth (*Knowles* was with him), in support of the rule. First, as to

entering the verdict for the plaintiff on the fourth plea, there was no evidence to go to the jury that this was a public highway, as it is a mere *cul-de-sac*, and no thoroughfare.

[LORD CAMPBELL, C. J. May not a square having only one entrance be a highway?]

Possibly that might be so, if the public had acquired a free right of passage round it.

[COLERIDGE, J. According to the finding, it must be taken that there has been a user of the way by the public.]

Except the fact of paving and lighting, there was nothing to show that this was any thing more than a private way to the houses of the plaintiff. A highway is defined in 1 Hawk. P. C. c. 32, s. 1. *The Rugby Charity Trustees v. Merryweather*, is dissented from by Mansfield, C. J., in *Woodyer v. Hadden*, in which case the facts were much stronger in favor of it being a highway than they are here; and yet it was held that there was no evidence to go to a jury of its being a highway.

[LORD CAMPBELL, C. J. There was there no dedication to the public.]

There was at least as much evidence of dedication as here; but it seems to have been treated by the court as a question of law whether a highway could exist without a thoroughfare. In *Wood v. Veal*, also, it was doubted by two of the judges whether such a highway could exist. Then, as to the third plea. (He was here stopped by the court.)

LORD CAMPBELL, C. J. We are of opinion that the third plea is bad in point of law, though it was proved in point of fact. It was made out that this was a public place within the meaning of the Metropolitan Paving Act, but the plea does not show that the defendant was at all justified in removing the obstruction erected by the plaintiff, or in committing a trespass by reason of any right which he had or required to exercise over that public place. According to *Dimes v. Petley*, that should be made out. A person cannot at his pleasure go into a public highway and remove an obstruction which may happen to be there. He must show some necessity for his going over the part obstructed. If, therefore, the third plea had been the only plea on the record, the plaintiff would have been entitled to judgment generally; but as I think the fourth plea shows a good defence which is proved in fact, the plaintiff will only have judgment *non obstante verdicto* on the issue raised by the third plea. The fourth plea alleges a public highway as existing over the place in question. We must take it that there is a good finding on this issue, unless there cannot in point of law be a highway where there is no thoroughfare. Now such a position cannot, I think, be supported. There may or there may not be a highway under such circumstances. It would be very strong to hold that there can be no highway, even where there has been an express dedication to a public purpose, because the place is no thoroughfare. There may be a large square with only one entrance to it, and if the owner allows the public to use it without

restriction for a great many years, he cannot afterwards turn round and say they were all trespassers. That would be, as said by Lord Kenyon, a trap to make people trespassers. In *The Trustees of the Rugby Charity v. Merryweather*, Lord Kenyon laid it down that there might be a public highway where there was a *cul-de-sac*, and that it was a question for a jury, on the evidence, whether such a place was a highway or not. I do not find that that case has ever been expressly overruled. In the other cases referred to, the judges do not hold that such a highway cannot exist, but only say that there is no evidence of there being a highway. It seems to me that it rests on the principle of convenience, that there may be a highway without a thoroughfare, and it is not inconsistent with what is laid down by Hawkins, and other text writers on the subject. The jury having here found that there was a highway, the fourth plea is made out, and, being unobjectionable in point of law, the defendant is entitled to judgment upon it.

COLERIDGE, J. The question for the court now arises on the issue raised by the fourth plea. The facts proved are, that there is a public street, and at the side a passage leading to a court, consisting of about fifteen houses, which belong to the plaintiff. The passage had been paved by the commissioners, at the request of the plaintiff. It had always been lighted by the parish authorities. The jury have found that this is a public highway. They must, therefore, have been satisfied by the evidence that there had been a dedication to the public and an user by them. This finding must be considered as satisfactory. Then is there any legal impossibility in there being a highway where there is no thoroughfare, and in a place like this, where all the houses belong to one person? I think no such legal impossibility has been established. It is said that it must be assumed to be only a private way, for the use of the occupiers of the houses. But the question is, whether there has been a dedication to the public and a free use of the way by them. More or less user may be capable of being proved according to the size and nature of the place, but we are not now considering the weight of the evidence, but only whether the verdict can possibly be supported.

ERLE, J. The question is, whether there can be in law a highway where no thoroughfare exists. It seems to me clear from the authorities that there can be such a highway; and convenience requires that this should be so. It is for the jury, to consider whether, on the whole of the facts proved, they will presume a dedication to the public. We must take it that they have found a dedication here, and there is certainly some evidence of that fact.

CROMPTON, J. I am quite satisfied that in law, there may be a highway in a place like this. It is always a strong observation to a jury that the way leads nowhere; still, if they are satisfied that

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it is a highway in point of fact, I know of no objection to their being so.

Rule absolute for judgment non obstante veredicto on the third plea.

Rule to enter the verdict on the fourth plea discharged.

MARDALL v. THELLUSON & others, Executors, &c., of W. Theobald, deceased.¹

June 18, 1852.

Set-off—Debt due to Executor—2 Geo. 2, c. 22.

Where a defendant is sued as executor for a debt which accrued due from his testator during his lifetime, he may set off a debt which has accrued due from the plaintiff to him as executor since the death of his testator.

Such debts are mutual, and due in the same right, within the meaning of the 2 Geo. 2, c. 22; the second clause of which, authorizing the set-off against an executor of debts due from the testator, does not limit the operation of the preceding clause.

[*Blakesley v. Smallwood*, 8 Q. B. Rep. 538, approved. *Shipman v. Thompson*, Willes, R. 103, explained. Eds.]

ASSUMPSIT. The first three counts were for work and labor done, and for money paid by the plaintiff for W. Theobald, in his lifetime, and for money due from the said W. Theobald to the plaintiff, upon an account stated between them, alleging promises by W. Theobald in his lifetime. The fourth was a special count upon a contract made by W. Theobald with the plaintiff. The last count was upon an account stated by the defendants as executors with the plaintiff after the said death of W. Theobald, alleging a promise by the defendants as executors.

Pleas (*inter alia*), *non assumpsit* to the whole declaration; and to the first, second, third, and last counts a set-off for money had and received by the plaintiff, for the use of the defendants as executors, and for money found to be due from the plaintiff to the defendants, as executors, upon an account stated between them.

At the trial, before Lord Campbell, C. J., at the sittings in Middlesex, after Hilary term last, the plaintiff had a verdict on the fourth count, and on the issue raised by *non assumpsit* to the common counts, and proof having been given of the set-off, a verdict was entered for the defendants on that issue. In the ensuing term a rule nisi for judgment *non obstante veredicto*, upon the issue raised by the plea of set-off, having been obtained,—

¹ 21 Law J. Rep. (N. S.) Q. B. 410.

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Channell, Serg. and *C. W. Wood*, showed cause.¹ In order to entitle the plaintiff to judgment *non obstante veredicto*, it must appear, not only that the plea is bad in law, but also that there is a confession of the plaintiff's cause of action. Such a judgment is in some of the old books called a judgment by confession. *Stephen on Pleading*, 107. Here there is no confession upon the record of any sum being due to the plaintiff upon the common counts. A plea of set-off is not in confession and avoidance.

[LORD CAMPBELL, C. J. I should have thought it peculiarly so.]

But, admitting that to be so, this plea is good in law. The objection made to it is, that as the plaintiff sues for work and labor done for the testator, and alleges a promise to the testator, a plea setting off a debt due to the defendants as executors cannot be supported; and, because it is pleaded to all the counts generally, and is bad as to one of them, therefore it is bad altogether. But the rule which has prevailed in actions by executors, does not extend to actions against executors. In *Williams on Exec.* 1473, 3d edit., it is said—"By statute 2 Geo. 2, c. 22, s. 13, where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other. But in an action by an executor in his own name to recover money due to the testator in his lifetime, and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator." In the present case the plaintiff is enforcing a demand due from the testator against the defendants as executors, and they can only be liable out of the assets. It is, therefore, reasonable that they should be allowed to set off a debt due from the plaintiff to them as executors, and in respect of which the assets would be increased.

[LORD CAMPBELL, C. J. The declaration alleges that the testator was indebted to the plaintiff. The plea does not allege that the plaintiff was indebted to the testator, but to the defendants as the executors. Therefore, the debts do not seem to be mutual between the testator and the party, as required by the statute 2 Geo. 2, c. 22.]

CROMPTON, J. There certainly is a difference whether executors sue or are sued as such. In the first case, the assets might be interfered with, if a set-off for a debt due from the testator to the defendant were allowed, but it is not so in the latter case. The difficulty arises from the words of the statute of set-off.]

The words of the act must be intended to include such a case as this, where the debts substantially exist between the same persons. *Blakesley v. Smallwood*, 8 Q. B. 538; s. c. 15 Law J. Rep. (N. S.) Q. B. 185, is directly in point. There it was held, that in an action against the defendants as executors, upon a cause of action accruing after the death of the testator, a set-off for money due from the plaintiff to the testator might be pleaded. The judgment of the court

¹ May 22, before LORD CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J. A cross-rule was obtained by the defendant to enter the verdict on the special count, which it is not thought necessary to report.

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there proceeds on the fact, that the declaration was founded on the liability of the defendants as executors, and that they ought, when so sued, to be allowed to show that the testator was not indebted to the plaintiff upon striking a balance. The present case is the exact converse of that; and, upon the same reasoning, the defendants, who are sued as executors upon a liability of their testator, must be at liberty to show that the plaintiff has, since the testator's death, incurred a counter-liability to them in their representative capacity. The case of *Shipman v. Thompson*, Willes, 103, is not an authority to show that this set-off cannot legally be made. They referred also to Willes, 264, n.

Ogle, contra. The defendants must rest on the statute, and this is not a mutual debt. They might have sued in respect of this debt, either as executors or in their own right; and if they had adopted the latter course, the debt due from the testator could not have been set off. *Shipman v. Thompson*, and other cases, are clear upon this point, and the reasons in those cases apply equally to the present. All the authorities on the subject go to show that a set-off of this nature cannot be made. The rule, therefore, ought to be made absolute.

Cur. adv. vult.

Judgment was now delivered by —

LORD CAMPBELL, C. J. Upon a rule for judgment *non obstante veredicto*, the question is raised, whether a debt due to the defendant as executor for money had and received, after the death of the testator, can be set off against a debt due from the defendant, as executor, having become due from the testator before his death? The statute 2 Geo. 2, c. 22, gives the right of set-off where there are mutual debts between the plaintiff and the defendant; and the debts above mentioned are comprised in these words, they being mutual and due in the same right between the plaintiff and the defendant. Although the second clause, authorizing, in the case of a suit by or against an executor, the set-off of a debt due from the testator, does not apply, we think that clause was not intended to restrict the operation of that which preceded. This construction was adopted in *Blakesley v. Smallwood*, and a set-off of a debt from the plaintiff to the testator was allowed against a count upon an account stated by the executor with the plaintiff. Against this view, the plaintiff contended that such a set-off had been held illegal in *Shipman v. Thompson*, and the cases referred to in Willes, 264, *in notis*. But upon examination, these authorities do not appear to support the position contended for. In *Shipman v. Thompson* the plaintiff sued for money due to the testator, received by the defendant after his death, and the defendant attempted to set off a debt from the testator before his death, so that the question appears the same, the parties being reversed. But the plaintiff in that case sued in his own right, and not as executor. This he had the option of doing, in respect of money received after the death; and as he was suing in his own right, a debt due from the

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testator was not a mutual debt within either clause of the statute. In respect of such a debt, the executor may sue in either capacity; and by suing in his own right, and so preventing the set-off, he prevents a creditor from interfering with the distribution of assets; while on the other hand, if, when sued as an executor for a debt due before the death, he is allowed to elect to treat a debt accruing after the death as due to him as executor, the same mischief is prevented. A plaintiff, while wrongfully withholding assets equal to the debt he claims, ought not to be allowed to take from the assets a further amount in payment of that debt, and force the executor to the risk and waste of another action for the assets so wrongfully withheld, instead of making a set-off in the first action.

*Rule discharged.*¹

KERNOT v. PITTIS.¹

June 18, 1852.

Insolvent — Discharge without Adjudication — Vesting Order — 1 & 2 Vict. c. 110, ss. 37, 44 — Action by Insolvent — Pleading — Traverse.

Where an insolvent, who has petitioned for his discharge under the 1 & 2 Vict. c. 110, is discharged out of custody by the default or consent of his detaining creditor, without any adjudication being made:—

Held, by LORD CAMPBELL, C. J., and COLERIDGE, J., (affirming *Grange v. Trickett*, 21 Law J. Rep. (N. S.) Q. B. 26; s. c. 7 Eng. Rep. 431); that upon such discharge the vesting order becomes void, and that the property which had passed to the assignees under it reverts in the insolvent.

Held, by ERLE, J., that the vesting order continues in force notwithstanding such discharge until made null by the Insolvent Court.

Section 44 of the 1 & 2 Vict. c. 110, provides that, in case any prisoner as to whose estates and effects any vesting order shall have been made shall, by the consent or default of his detaining creditor, be discharged out of custody without any adjudication being made, in such case no action shall be commenced against the provisional assignee, nor against any person duly acting under his authority, except to recover any property, &c., of such prisoner detained after an order made by the Insolvent Court for the delivery thereof and demand made thereupon. To an action of detinue, the plea stated proceedings in the Insolvent Court and the making of a vesting order, whereby the goods of the plaintiff in the declaration mentioned became vested in S. S., the provisional assignee; and alleged that the defendant, as the servant and by the authority of the said S. S., so being such provisional assignee after the making of the said vesting order, detained the said goods in the declaration mentioned. The replication alleged that, before the defendant detained the said goods, the plaintiff was discharged out of custody by the default of his detaining creditor, without any adjudication being made by the court, and that the defendant did not detain the said goods by virtue of any order, authority, or command of the said S. S. made or given to the defendant before the plaintiff was so discharged as aforesaid.

¹ On the other hand, if a suit be brought by an executor to recover a demand due him as executor, and created since the decease, the debtor cannot set off a claim due him from the testator in his lifetime. The authorities generally agree on this point.

² 21 Law J. Rep. (N. S.) Q. B. 418.

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On special demurrer to the replication : —

Held, that it admitted that the goods were detained by the defendant under the authority of S. S. given after the plaintiff's discharge, but before any order of the Insolvent Court for the delivery of the goods; and that, even supposing on the discharge without adjudication, the property revested in the insolvent, the plea was an answer to the action.

Held, also, that the allegation in the plea, that the defendant, detained by the authority of the provisional assignee, was not premature, and might have been traversed by the replication.

DETINUE. The declaration was in the usual form.

Plea. That before the accruing of the causes of action, to wit, on &c., the plaintiff then being a prisoner in actual custody within the Queen's Prison, detained at the suit of one J. P., for the sum of, &c., and also detained in the said prison, at the suit of T. M. C., for the sum of, &c., did, whilst he was and continued to be such prisoner in such actual custody as aforesaid, to wit, on, &c., by the permission, leave, and order, of the Court for the Relief of Insolvent Debtors, duly and according to the directions and provisions of the 1 & 2 Vict. c. 110, apply by petition, in a summary way, to the said Court for the Relief of Insolvent Debtors, for his discharge from such custody, according to the provisions of the said act, in which petition was stated, &c., and which said petition was, within the time prescribed by the said act, duly subscribed by the plaintiff, and was forthwith, to wit, on, &c., filed in the said court pursuant to the said act. That upon the said filing of the said petition, and before the commencement of the suit, the plaintiff then and still being a prisoner in actual custody as aforesaid, the said court, in pursuance and according to the said statute, ordered that all the real and personal estate and effects of the plaintiff (except the wearing apparel, &c.), and all the future estate, right, &c., of the plaintiff, in or to any real or personal estate and effects which he might purchase, or which might revert, descend, or be devised or bequeathed or come to him, before he should become entitled to his final discharge, in pursuance of the said act, according to the adjudication made in that behalf, or in case the plaintiff should obtain his full discharge without any adjudication being made by the said court, then before the plaintiff should be fully discharged from custody, and all debts due or growing due to him, the plaintiff, or to be due to him before such discharge as aforesaid, should be vested in the provisional assignee for the time being of the estate and effects of insolvent debtors in England, his successors and assigns; which said order was then, and whilst the plaintiff was and continued to be a prisoner in actual custody as aforesaid, duly entered of record in the said court, and then, during the last-mentioned time, was published according to the directions of the said court; by virtue of which said order and the said statute, the said goods and chattels in the declaration mentioned, and all rights of action in respect thereof then, and before accruing of the causes of action, and whilst the plaintiff was and continued to be a prisoner in actual custody as aforesaid, became and were vested in the said provisional assignee, to wit, one S. S., &c.; and that the defendant, as servant and by the authority and command of the said S. S., as and

so being such provisional assignee as aforesaid, after the making of the said vesting order as aforesaid, detained the said goods, &c.

Replication, that after the making of the said vesting order, and before the defendant detained the said goods and chattels in the declaration mentioned, to wit, on, &c., the plaintiff was discharged out of the said custody by the default of the said J. P., and by the consent of the said T. M. C., the said detaining creditors of the plaintiff, without any adjudication being made in that behalf upon the said petition of the plaintiff by the said Court for the Relief of Insolvent Debtors; and that the defendant detained and detains the said goods and chattels after the plaintiff had been so discharged as aforesaid, and did not, nor does he detain the same, or any or either of them, by virtue of any order, authority, or command of the said S. S., made or given to the defendant before the plaintiff was so discharged as aforesaid. Verification.

Special demurrer, on the grounds that the replication admits the existence of the vesting order, but shows no order of the Insolvent Court revesting the goods in the plaintiff, and consequently admits that the plaintiff has no title to maintain the action; that the discharge of the plaintiff operated only to discharge his person from custody, and did not revest in him the property, title, or right of possession in the said goods; that the allegation in the replication that the defendant did not detain, nor does he detain the goods and chattels by virtue of any order, authority, or command of the said S. S., made or given to the defendant before the plaintiff was discharged, is ambiguous, as it cannot be collected therefrom whether it means to deny absolutely that S. S. ever gave the defendant authority or command to detain the said goods, or only to deny that the said authority or command was made or given before the plaintiff was discharged from custody, or whether it means to deny the authority or command referred to, or that the detention by the defendant was in virtue of that authority; that the replication does not anywhere show that the said goods were, at any time after the making of the vesting order, in the possession of the plaintiff, &c.

Joinder in demurrer.

Willes, in support of the demurrer (June 4 and 8.) One question which may be here raised is the same as that decided in *Grange v. Trickett*, 21 Law J. Rep. (N. S.) Q. B. 26; s. c. 7 Eng. Rep. 431, where it was held that the discharge out of custody of an insolvent, with the consent of his detaining creditor, without adjudication, had the effect of revesting in the insolvent the estate and effects which had passed by the vesting order to the provisional assignee. But there is a material distinction between that case and the present. Here, the defendant justifies under the provisional assignee, which was not the case there. The 1 & 2 Vict. c. 110, s. 44, makes a broad distinction between the provisional assignee and those acting under his authority, and all other persons. No action is to be commenced against such assignee or any person duly acting under his authority, except to recover any property, money, estate, or effects of such prisoner,

detained after an order made by the Insolvent Court for the delivery thereof and demand made thereupon. Here no such order of the court has been made. Therefore, even if *Grange v. Trickett* be well decided, the defendant is entitled to judgment on this record. But it is submitted that *Grange v. Trickett* is not correct in law. The former Insolvent Act throws some light on the 1 & 2 Vict. c. 110, in this respect. [He referred to 53 Geo. 3, c. 102, ss. 10, 13, and 1 Geo. 4, c. 119, ss. 4, 7, and to the 7 Geo. 4, c. 57, ss. 11, 18, 35.] The main alteration effected by the 1 & 2 Vict. c. 110, was to give creditors a right of petitioning, and to substitute the vesting order under section 37, in the place of an assignment. In the event of such a discharge as the present, the estate of the insolvent remains vested in the assignees to be distributed under section 62, unless the Insolvent Court makes an order for revesting it in the insolvent.

[LORD CAMPBELL, C. J. What power is there to make such an order?]

The proviso at the end of section 37, expressly gives the court power to make such an order upon a creditor's petition. The court has also a discretionary power to dismiss the insolvent's own petition. It is plain, therefore, that the estate does not, under all circumstances, remain vested in the assignees. Section 44 confirms the possession of the assignees; and, according to the judgment of Patteson, J., in *Grange v. Trickett*, the vesting order is not void upon such a discharge as is there mentioned, but an order for the delivery up of the property vested in him may be made on the assignee. By section 41, there are certain defaults of the detaining creditor, by reason of which the insolvent is not to be discharged. It is, therefore, necessary that the court should make an order on him so as to enable him to know whether the discharge has properly taken place, as otherwise he would be exposed to great risk.

Milward, contra. It does not appear in these pleadings that the defendant justifies under the provisional assignee. The replication traverses that the defendant detains the goods by virtue of any authority given by the provisional assignee, and that traverse is admitted by the demurrer. If the property revested in the insolvent after the discharge, the assignee could not, therefore, give any effectual directions or authority as to the property. Moreover, the allegation in the plea that the defendant detains as servant and by the authority of the provisional assignee, is premature, and the plaintiff was not bound to traverse it. Therefore, there is no distinction between this case and *Grange v. Trickett*, which, it is contended, was well decided. Either this replication is good, or the plea is bad in substance, for not showing that the plaintiff was in custody during the whole of the proceedings. The 1 & 2 Vict. c. 110, provides for two cases, either a petition by a prisoner for his own discharge under section 25, in which case he agrees to give up his estate and effects in consideration of his person being free from process; or, under section 36, a creditor may petition for an order to vest his debtor's estate in the provisional assignee, which is a proceeding somewhat analogous to

a bill in equity filed by a creditor on behalf of himself and all other creditors. In either case the vesting ceases at the moment when the prisoner gets out of custody, without an adjudication by the court. *Hollis v. Bryant*, 12 Sim. 492; s. c. 11 Law J. Rep. (N. S.) Chanc. 231, shows that the petitioning creditor cannot be compelled to assent to the discharge where there are other creditors. Then section 37 vests in the assignee all the existing estate absolutely, and all future property which the insolvent may acquire up to the time of his final discharge by adjudication, or before he is fully discharged from custody without adjudication. A final adjudication is made when all his creditors have been paid their debts in full or have accepted a compromise; until that time he is not discharged from liability. The language of the 37th section draws a line at the time of a discharge without adjudication; and if the argument of the defendants be correct, there would be no reason for any such distinction. Then the proviso is, that in case a prisoner's petition is dismissed by the court, the vesting order is to be null and void. In that event, therefore, no order is required to revest the property in the insolvent. The case of a discharge by the default of the detaining creditor stands in the same position as a dismissal of the insolvent's own petition, and in that case also no order to revest the property is necessary. Section 38 seems to require, as the groundwork of the jurisdiction of the court, that the insolvent should be in actual custody during the whole proceedings. The court, therefore, could not dismiss the petition after the discharge from custody. *Drury v. Houndsfield* 11 Ad. & E. 101, shows that a creditor is not bound to assent to the insolvent's discharge. He referred also to sections 39, 40, and 41, and *Buzzard v. Bousfield*, 4 Mee. & W. 368; s. c. 8 Law J. Rep. (N. S.) Exch. 3. Section 44 is the one on which this question turns. It is clear that it is there assumed that, upon a discharge by default of the detaining creditor without adjudication, the property is revested in the insolvent. The same provision is made for the event of a fiat in bankruptcy, which avoids the vesting order, and divests the property out of the assignee in insolvency by section 39. But in that case, by section 40, the vesting order is to remain in the court, and, after the certificate in bankruptcy, the rights of the provisional assignee are to be the same as if the vesting order had still continued in force. It would have been unnecessary to provide that no action should be brought against the assignee, except after an order of the court, unless the property was, in the cases specified, divested out of the assignee.

[LORD CAMPBELL, C. J. That certainly seems to be assumed by section 44. But, is it not inconsistent with the other parts of the act?]

It is quite consistent with section 38, and various other sections of the act, which require all proceedings to be taken during the continuance of the custody. [He referred to sections 62, 69, 70, 71, 72, 74, 75, 76, 81, 83, 87, 90, 91, 92.] If a prisoner is discharged, his creditor's right to the debt is gone. But if the property still remains in the assignees to be distributed, the creditor would be entitled to a dividend although the debt is gone.

[ERLE, J. If, the day after the discharge, the assignee sells in ignorance of it, is he protected?]

Section 44 might possibly operate to protect him, as no action could be brought without the leave of the court. That must be the effect of the order for delivery of the property.

[ERLE, J. That clause is not applicable to all times. For instance, if the assignee comes a month after the discharge and takes a chattel purchased since, he could clearly be sued.]

[LORD CAMPBELL, C. J. Suppose, under section 62, a dividend made before adjudication, and then a discharge without adjudication, what would be the effect?]

The property in the hands of the assignees would revest, but as to the money already distributed the assignees would be protected under sect. 44. The effect of the discharge is, to give the creditors all the rights which they had before the petition was filed, and it should therefore follow that the prisoner should have his property again in order to meet their demands.

Willes, in reply. It is said to be necessary that the custody should continue, in order to give the court jurisdiction to deal with the property, and that, therefore, if the custody determines, the vesting order is at once avoided. But suppose the insolvent dies, there is in that case no provision for divesting the property out of the assignee, and it might go on to be distributed, although all power to deal personally with the insolvent is gone. Section 28 only excludes from the benefit of the act an insolvent who petitions, unless he remains in prison during all the proceedings, but it does not show that the jurisdiction of the court over the estate is taken away. Section 40, relating to a fiat in bankruptcy, is strongly in favor of the defendant's argument. The property is to be divested up to the time of the certificate in bankruptcy, but then the provisional assignee's title is to attach again.

[COLERIDGE, J. It makes the vesting order, which was before void, again valid.]

But it shows strongly that the policy of the act is not that an insolvent who gets out of prison without adjudication should have all his property *ipso facto* revested in him.

[LORD CAMPBELL, C. J. The Insolvent Act is founded on a *cessio bonorum*; but, according to your argument, a debtor may be stripped of all his property, and derive no benefit from the act, where his detaining creditor chooses to discharge him.]

The court has a discretionary power to dismiss the petition, in which event the property would revest in him, and they would by that mode prevent a creditor from doing injustice to the insolvent.

[LORD CAMPBELL, C. J. If the property has been all sold, that would be but a slender remedy.]

That is a risk which must be run by him whose misfortunes have rendered it necessary. No injury is done by distributing the debtor's property among his creditors. Then, as to section 44, it contains no distinct enactment that upon a discharge without adjudication the

vesting order is to become void, and previous sections of the act do contain such an express enactment in certain cases, but not in that particular event. The rule of construction, therefore, applies, that the legislature did not intend such a result in that instance. It is no doubt to some extent inconsistent with a continuance of the vesting order, that the assignees should require protection, but in other respects it is quite consistent with it.

[COLERIDGE, J. The latter part of section 44 seems to assume that the right to the property is in the insolvent, and that all he requires is an order upon the assignees to deliver it up.]

Those words give a power to the court to order the property to be given up after the insolvent has been discharged without adjudication; the preceding part of the clause must be rejected as superfluous. Then, as to the pleadings, a vesting order had been duly made, and the acts of the defendant were done under the authority of the provisional assignee. The plaintiff is in the position of a person discharged without any adjudication, and by section 44 he is incapable of maintaining an action against a person in the position of the defendant, except in respect of property detained after an order of the court for its delivery, and a demand thereof. The replication does not traverse the authority, but only that the authority was given before the discharge. It, therefore, admits the authority. It is said that this allegation in the plea is "leaping before the stile." But the plea would show no justification of the defendant without it, as a mere stranger has no right to detain the property. The plaintiff was, therefore, bound to deny or to confess and avoid that allegation.

Cur. adv. vult.

The learned judges now delivered their opinions *seriatim*.

LORD CAMPBELL, C. J. I do not think that I am called upon in this case to review our decision in *Grange v. Trickett*, as the defendant is entitled to our judgment, whether the property in the goods mentioned in the declaration did or did not re-vest in the plaintiff on his discharge from custody. If the property still remains in the provisional assignee, of course the action is not maintainable. But if it re-vested in the plaintiff, still I think there is a good defence under section 44 of 1 & 2 Vict. c. 110, which enacts, "that in case any prisoner, as to whose estate and effects any vesting order shall have been made, shall by the consent and default of his detaining creditor be discharged out of custody without any adjudication being made, in such case no action or suit shall be commenced against such provisional assignee, or against any assignee or assignees appointed under this act, nor against any person duly acting under his or their authority, except to recover any property, estate, money, or effects of such prisoner, detained after an order made by the said court for the delivery thereof, and demand made thereupon."

The defendant, in his plea, after setting out the proceedings in the Insolvent Court, down to the making, recording, and publishing of

the vesting order, whereby the goods in the declaration mentioned became vested in Samuel Sturges, the provisional assignee, further says, that he, the defendant, "as servant, and by the authority and command of the said Samuel Sturges, as and so being such provisional assignee as aforesaid, after the making of the said vesting order as aforesaid, detained the said goods in the said declaration mentioned as therein alleged, as he lawfully might for the cause aforesaid." The replication does not allege that any order had been made by the Insolvent Court for the delivery of the goods to the plaintiff, or that they had been demanded from the provisional assignee or from the defendant; but after stating the plaintiff's discharge out of custody, without any adjudication, with the consent of the detaining creditors, concludes with merely averring that "he did not detain, nor does he detain, the said goods by virtue of any order, authority, or command of the said Samuel Sturges, made or given to the defendant before the plaintiff was so discharged as aforesaid." The plaintiff thus admits that the goods were detained by the defendant under the authority and command of Sturges, the provisional assignee, given after the plaintiff's discharge from custody, but before any order by the court for the delivery of the goods or demand made thereupon. Must not the defendant be taken to have detained the goods under the authority of Sturges within the meaning of the enactment referred to? It seems quite clear that Sturges himself would not have been liable to an action if he had detained the goods in his own hands, after the plaintiff was discharged from custody, till an order for delivery and demand. Can it be contended, then, that a warehouseman, agent, or servant employed by him to keep them safely is liable to this action? I think that the same protection is extended to him as to the provisional assignee. We are now arguing upon the supposition, that the discharge of the debtor before adjudication re-vests in him the property in his effects which had vested in his provisional assignee. To protect the provisional assignee and those acting under his authority from an action for detaining goods, till they know authentically that the debtor is entitled to them, and they have an opportunity of delivering them up to him, it seems to me that this very reasonable provision is introduced, which is quite consistent with the title being in the debtor, and with his having a right to call upon the court to make an order for restoring the goods, as suggested by my brother Patteson in *Grange v. Trickett*. Objection was made to the allegation in the plea of a detainer by authority of the provisional assignee, on the ground that it was premature, and, therefore, that there was no occasion to traverse it; but I am of opinion that this allegation might be introduced into the plea, and that on the demurrer to the replication as it is framed, there ought to be judgment for the defendant.

COLERIDGE, J. I agree with my Lord Campbell in thinking that it is not necessary in this case to review our former decision in *Grange v. Trickett*. It is unnecessary for me at present to say more

than that, up to the present time, I have neither read nor heard any thing which satisfies me that that decision is wrong. I agree also in the conclusion to which Lord Campbell has come on the present pleadings, and also in the reasons on which he has founded that conclusion; and it is unnecessary for me to say any thing more.

ERLE, J. I am of opinion that the vesting order, mentioned in the plea, continues in force, notwithstanding the discharge from custody, with the consent of the plaintiff, mentioned in the replication. The vesting order, under section 37, transfers the property to the assignee; and there is no provision for defeating that title, or making the vested order void, or its power to cease by such a discharge from custody. The pernicious effect of enabling the insolvent to collude with the detaining creditor, for the purpose of defeating the rights of the other creditors, is obvious, and that effect would be prevented by holding the vesting order valid until an adjudication under section 37 had rendered it void. With respect to section 44, although the provisions for the protection of the assignee may be superfluous, unless the vesting order is rendered void, still I think it a sounder construction to hold them to be superfluous, rather than to create by conjecture a defeasance to an important title for the purpose of finding an application for them. It is unnecessary for me to say more, as the reasons for this construction are fully and clearly given in the judgment of Mr. Commissioner Law, *In the matter of Henry Charles Mander*.¹ The 44th section has been construed, by my lord and my brother Coleridge, to protect the assignee from any action until after an order for delivery of property by that court, although the vesting order is rendered void by a discharge from custody, and so to defeat the present plaintiff. But if the vesting order was intended to be made void, it is anomalous to suppose it should have force, after avoidance, to protect the person who was assignee under it, for a taking or keeping of the property of the person that was insolvent subsequent to such avoidance, and to debar the alleged insolvent from the common remedies for protection of property, until he should obtain an order of that court authorizing him to use such remedies. By this construction, the legislature would have made the vesting order void, and at the same time, for many purposes valid, until an order of the Court for Insolvent Debtors should have been made, which seems an inconsistency; and anomalies with respect of title to property are introduced; and as all the advantages of this construction would be obtained without inconsistency or anomaly, by holding the vesting order valid until made null by the court, I dissent from the construction holding it void, and the assignee, after its avoidance, to be protected thereby.²

¹ This judgment, which had been printed, was referred to in the course of the argument.

² CROMPTON, J., having heard part only of the argument, did not deliver any judgment.

Regina v. Avery.

Milward, then, prayed leave to amend the replication, in order that the question decided in *Grange v. Trickett* might be raised in the Exchequer Chamber. The court permitted him to amend accordingly, otherwise judgment for the defendant.

The pleadings having been amended, the demurrer came on again for argument (Nov. 10), when the court ordered that judgment should be entered for the plaintiff, in accordance with the decision in *Grange v. Trickett*.

Judgment for the plaintiff.

REGINA v. AVERY.¹

May 26, 1852.

Municipal Corporation Act — Voting Paper — Signature by Initials — Description of Qualification.

Where, at an election of councillors for a borough, the voting paper is signed with the surname and the initial of the christian name of the burgess voting, it is a sufficient compliance with section 32 of the 5 & 6 Will. 4, c. 76.

The voting paper described the property in respect of which a burgess voted, as "Pilton Street." He was described in the burgess roll as "of Pilton," and his qualifying property "House, in the Street." It appeared in evidence that Pilton consisted of only one main street, which was called "Pilton Street," or "the Street," indiscriminately: —

Held, that the voting paper was sufficient.

INFORMATION in the nature of a *quo warranto* for exercising the office of councillor of the borough of Barnstaple.

The plea stated that the defendant, being duly qualified, was elected a councillor of the said borough.

The replication traversed that the defendant was elected *modo et forma*, on which issue was joined.

At the trial, before Erle, J., at the last Devonshire spring assizes, several of the votes given on behalf of the defendant were objected to as invalid, but the learned judge was of opinion that sufficient ought not to be struck off to turn the scale of the election, and directed a verdict to be returned for the defendant, subject to leave reserved to the relator to apply to the court to enter a verdict for the crown if certain votes objected to by him at the trial were invalid. One class of votes objected to was taken to be represented by the case of a voter described on the burgess roll as "Ambrose Toop Powning," who delivered a voting paper signed "A. T. Powning." It was admitted that in these cases there was no doubt as to the identity of the party voting, or his qualification to vote, and the objection was rested solely upon the ground that a signature by initials was not a

¹ 21 Law J. Rep. (N. S.) Q. B. 428.

compliance with the Municipal Corporation Act. Another set of votes depended upon the following case:—James Cooksley, who was described in the burgess roll as “of Pilton” and his qualifying property as “House in the Street,” delivered in a voting paper signed “James Cooksley, Pilton Street.” It appeared in evidence that Pilton was a parish lying partly in the borough, and that it consisted of one main street, and other lanes and small streets; and that the main thoroughfare was called “Pilton Street,” or “the Street” indiscriminately.

A rule *nisi* to enter a verdict for the crown having been obtained pursuant to the leave reserved,—

Crowder and *Taprell* now showed cause. The signature by initials is a sufficient compliance with the 5 & 6 Will. 4, c. 76. All that is required by the 32d section is that the voting paper should be “signed with the name of the burgess voting.” The signature may be made, as here, in the voter’s ordinary way. Such a signature would be sufficient to satisfy the provision in the Statute of Frauds. No doubt can arise as to the identity of the voter, for he appears, and may be asked to affirm himself to be the person named. There could be no deception practised. Every means existed for ascertaining the correctness of the signature. The case of *The Queen v. Hartlepool*, 2 L. M. & P. 666; s. c. 8 Eng. Rep. 303, is a strong authority here, and establishes that it is enough if the signature be such as the party is usually known by. Where the christian name is required in full, it is usually so expressly provided. It is so in Schedule (D.) to this very act, and in the schedule to the Reform Act, and in the Registration of Voters Act, 6 Vict. c. 18, s. 40, and in the 6 & 7 Will. 4, c. 70, s. 14, relating to the publishing of newspapers. The Uniformity of Process Act, 2 & 3 Will. 4, c. 39, s. 12, requires every writ to be indorsed with the name of the attorney suing it out, and it has been held that the attorney’s christian name need not be stated. *Pickman v. Collis*, 3 Dowl. P. C. 429; *Hartley v. Rodenhurst*, 4 Ib. 748. They referred also on this point to *Owen v. Scales*, 10 Mee. & W. 657; s. c. 12 Law J. Rep. (N. S.) Exch. 26; *James v. Swift*, 4 B. & C. 681; and *Roberts v. Williams*, 2 Cr. M. & R. 562; s. c. 5 Law J. Rep. (N. S.) M. C. 23. But, further, this is, at most, a misnomer or inaccurate description, which is cured by the interpretation clause of the 5 & 6 Will. 4, c. 76.

The Attorney-General, Slade and *M. Smith*, in support of the rule. Section 15, of the 5 & 6 Will. 4, c. 76, requires that the burgess list shall be made out in the form given in Schedule (D.), which requires expressly the christian and surname at full length, and the intention was that the voting paper should correspond with the burgess list, so that there might be no doubt as to the identity of the party. There was no necessity to express in the 32d section that the burgess should sign at full length; that was sufficiently indicated by requiring that the name in the voting paper should correspond with the name in the burgess list. The proper rule applicable to this question is that laid

down by Wilde, C. J., in *Eidsforth v. Farrer*, 4 Com. B. Rep. 9; s. c. nom. *Farrer v. Edsworth*, 16 Law J. Rep. (N. S.) C. P. 132. The "name" of a party, according to its general acceptation, implies both the christian names and surname at full length. That is the way in which it would appear on the burgess roll, and it should be so signed to the voting paper.

[LORD CAMPBELL, C. J. The legislature expressly requires that in regard to the person voted for, but it has used different language as to the voter.]

Effect cannot be given to the policy and spirit of the act without so reading it. If an initial be sufficient, it would be equally competent to leave out the christian name altogether. Suppose the initial applied to two persons, as John Smith and James Smith, who were both on the roll, whose name is to be ticked off? The mayor is only entitled by section 34, to ask three questions, neither of which would avoid the difficulty.

[LORD CAMPBELL, C. J. The same difficulty would arise if there were two John Smiths on the roll and they each signed in full.]

Still the difficulty should not be carried beyond what is absolutely necessary. *The Queen v. Hartlepool* does not apply. The question there was whether the signature was to the like effect. Section 142 does not extend to this, which is not a case of misnomer, but an omission of the name. Neither is it an inaccurate description of any person, for that refers to the other particulars besides the name. But even if this did extend to the name, it is not an inaccuracy, but a total omission. Then as to the second class of votes, the description is clearly wrong. There are other streets in Pilton besides the main thoroughfare, and the property is not described as in the burgess roll, which is expressly required by section 32. The second question which may be asked under section 34, refers to the description on the burgess roll, and throws light on the meaning of section 32.

LORD CAMPBELL, C. J. I must confess that I have not been able to entertain any doubt in this case, which turns on the construction to be given to section 32, of the 5 & 6 Will. 4, c. 76, directing the mode in which the voting papers delivered on the election of councillors should be framed. Amongst other things, it requires such paper to be "previously signed with the name of the burgess voting, and with the name of the street, lane, or other place, in which the property for which he appears to be rated on the burgess roll is situated." We have, therefore, to determine whether these papers containing the surnames of the voters with initials for their christian names—such persons being well known by such signatures as the parties entitled to vote—are signed according to the requirements of the statute. Now we must give this statute such a construction as would be put upon it by any person reading it grammatically, and according to the natural meaning of the words used. The burgess is to sign or to have another to write his name for him in the shape of a signature. What is the meaning of this requirement? Why, that the party signing it shall affix his name in the manner in which he

ordinarily writes it; that is, with the initial letter of his christian name and with the surname at full length, where such is his usual habit. It is allowed that a will or a deed so signed would be good under the Statute of Frauds. In some cases the legislature has required both christian names and surnames to be signed at full length, and in those cases that must be done. Here the paper is simply to be signed with "the name" of the burgess voting. There are various decisions on different statutes where it has been held not necessary to write the christian name at full length to make a perfect signature; for instance, where process is sued out by an attorney, or a notice of action is given to justices, it is enough if the name is signed in the usual manner. It was admitted that a contraction of the christian name would suffice. But what is an initial but a contraction? The *Hartlepool case* seems to me to be expressly in point; section 17 refers to the form in schedule (D.), and requires notice of the claim to be in the form there given, or to the like effect. The form gives a signature of both names at full length. Still, it was held, that a notice of claim signed by initials was sufficient. According to this view, the whole object of the statute will be effectually carried out, because any two burgesses may require questions to be put to the voter whether he is the person whose name is signed to the voting paper, and whether he is the person whose name appears on the burgess roll in respect of the property there described. If the person voting gives a false answer he may be punished. The election may be conducted with propriety by this method; if it were required that the christian name should be given at full length, great confusion might follow from such an interpretation. I think there is no mistake, and, therefore, no reason for having recourse to the interpretation clause. As to the other votes objected to, the point is hardly arguable. It is quite clear that all that is required is that the name of the street, lane, or other place shall be stated on the voting paper. According to the evidence, this was expressly complied with.

COLERIDGE, J. I remember at Eton being asked, "*Quid est tibi nomen et cognomen?*" and of course I was then bound to give my whole names, both christian names and surname, and my surname alone would not have sufficed. Here, however, we have to deal with a statute providing a mode of election where the votes are to be given by persons of all degrees of life and scholarship, and which does not require the ability of the party voting to write. The voters are to bring papers with their names signed—not merely written—on them. We are called upon to put a very narrow construction on those words, and to say that they mean both christian name and surname written at full length. But such a construction would be against the franchise, which is contrary to the universal rule adopted by the courts. It is not necessary to have recourse to section 142, because this is not a case within its provisions. But we may call it in aid, to show that the intention of the legislature was in favor of the franchise. It thus gives a key to the meaning of other parts of the act. Returning then to section 32, what is the proper meaning there of a man signing his

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name? In popular language that would be satisfied by signing the initials of his christian name and his surname.

ERLE, J. The voter who signs the voting paper with his surname at full length, and an initial for his christian name, has, in my judgment, complied with section 32. I take it to be a general rule that, in the case of parties claiming to exercise rights under this statute, we are to inquire whether they have expressed according to common understanding their intention to vote. If so, it is a valid exercise of the right, and our duty is to see it carried into effect. Now, where a man signs the initial of his christian name and his surname, he has, according to common understanding, signed his name. Therefore, without having recourse to the interpretation clause, these voting papers are valid.

CROMPTON, J. These voting papers were clearly signed with the name of the burgess voting. We must construe the words as they are used in common parlance; and no one reading this statute could doubt that such a signature is sufficient. There are many authorities that an instrument to be signed with the name of a party may be signed by initials. This very section also says, that the voting paper shall contain the christian names and surnames of the persons voted for, thereby showing that greater particularity is required in that instance.

Rule discharged.

REGINA v. THE JUSTICES OF SUFFOLK.¹

April 19, 1852.

*Sessions — Interested Justice — Invalid Order — Certiorari —
13 Geo. 2, c. 18, s. 5. — Notice to Justices — Form of Notice.*

Upon the trial of a parish appeal, F. S., one of the justices, who was a rated inhabitant of the appellant parish, was on the bench during the hearing, and, in the course of the proceedings, referred the chairman of the Quarter Sessions to some of the documents put in evidence. Upon an observation being made that he was a party interested, F. S. stated that he should take no part in the decision, but he remained in court until the final decision, which was in favor of the appellants. It was sworn that he did not vote or give any opinion upon the question at issue, nor did he influence the decision of the other justices present, and that if he had not believed that the parties were satisfied with his assurance that he would take no part, he would have retired from the court during the trial:—

Held, that under the above circumstances, the order of sessions was invalid by reason of the presence of the interested justice.

Held, also, that notice of an intention to move for a *certiorari* under 13 Geo. 2, c. 18, s. 5, was properly served on F. S., as a justice "by and before whom the order of sessions was made."

¹ 21 Law J. Rep. (N. S.) M. C. 169; 16 Jur. 612.

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The notice stated that application would be made for a *certiorari* "on behalf of the inhabitants" of the respondent parish, and was signed "J. M., attorney for the inhabitants of the respondent parish:"—

Held, to be sufficient.

A RULE had been obtained calling upon the justices of the peace for the county of Suffolk, in Quarter Sessions assembled, to show cause why a writ of *certiorari* should not issue to remove into this court all and singular orders made at an adjourned sessions, held on the 9th of January, 1852, upon an appeal between Needham Market and Haughley, in the said county, touching the removal of certain paupers from Haughley to Needham Market, in order that the same might be quashed, on the ground that an interested justice took part in the decision.

The affidavits upon which the rule was founded stated, that several questions of law and of fact were raised and discussed at the hearing of the said appeal, particularly that the notice of appeal was insufficiently signed, but that the court overruled the objection and quashed the order of removal, with costs; that the Rev. F. Steward, who was a rated inhabitant of the appellant parish, and one of the justices of the said county, took an active part during the argument upon, and the discussion of the said questions of law and fact, and upon five or six different occasions entered into conversation with the chairman, and referred him to the particulars of the documents put in evidence, apparently in favor of the argument of the appellants. The notice required by the 13 Geo. 2, c. 18, s. 5, was sworn to have been served on the Rev. F. Steward and F. G., "who were present at the session of the peace in and for the said county when the appeal mentioned in the said notice was heard, and were and are two of the justices of the peace in and for the said county, by and before whom the order of sessions mentioned in the said notice was made." This notice stated that application would be made "on behalf of the inhabitants of the parish of Haughley, in the county of Suffolk," for the writ of *certiorari*, and was signed "J. M., attorney for the inhabitants of the said parish of Haughley."

The affidavits in answer to the rule stated that, in the course of the argument and discussion of some preliminary objections made by the respondents to the sufficiency of the notice of appeal, one of the counsel for the respondents observed to the court that the Rev. F. Steward, who was then sitting on the bench, was a rated inhabitant of the appellant parish, and as such ought not to take any part in the trial of the appeal, upon which the chairman inquired of Mr. Steward whether he was such a rated inhabitant, and, being answered in the affirmative, assented to the correctness of the counsel's observation, and further stated that Mr. Steward would take no part in the hearing or decision of the appeal; that the chairman and Mr. Steward believed the said counsel to be satisfied with this assurance, otherwise Mr. Steward would have been requested to retire, and would have retired from the bench during the trial of the appeal; that the decision of the court as to the sufficiency of the notice of appeal, as well as that the order should be quashed, was come to by the chair-

man and three other justices then present, after conferring together in open court and without retiring, and without conferring with, or being influenced by, Mr. Steward, or by his presence at the hearing, and without any vote or opinion being given by him; that, during the trial of the appeal, the three other justices were seated on the right of the chairman, and Mr. Steward remained seated on his left. Mr. Steward in his affidavit admitted that he probably did speak to the chairman, and look at and refer to some papers lying before him, but he stated that he did not take any part in the argument or discussion of the questions at issue, nor did he enter into conversation with the chairman upon the same, or refer him to the particulars of the documents in evidence in favor of the arguments of the appellants, but on the contrary abstained altogether from giving any opinion upon, or taking any part in the decision of any question at issue or before the court, or from having any conversation with the chairman tending in any way to influence his judgment, or that of any other magistrate, or with the other three justices upon the subject of the said appeal. The chairman also stated that if Mr. Steward did, during the trial of the said appeal, make any observation to him, or look at or refer to any papers lying before him, he did not listen or attend to what was said or done by Mr. Steward, and that whatever observation might have been made by Mr. Steward was entirely unheeded by him, nor did he enter into conversation with Mr. Steward during the trial of the said appeal any further than before stated. The other three justices made affidavits to the same effect.

Couch now showed cause. There is no case made out to show that Mr. Steward took any part in the decision of this appeal. He was, no doubt, interested as a rate-payer, but not as a direct party to the appeal, as was the case in *The Queen v. The Justices of Hertfordshire*, 6 Q. B. Rep. 753; s. c. 14 Law J. Rep. (N. S.) M. C. 73.

[LORD CAMPBELL, C. J. If he was any way interested in the decision, he was not a competent judge.]

He was at all events competent until he was objected to.

[LORD CAMPBELL, C. J. I think that he ought of himself to have left the court when the appeal was called on, without waiting to be objected to. Such is the course always adopted in Westminster Hall whenever one of the judges has an interest in the question to be heard.]

Then, the affidavits show that there was an acquiescence in his remaining after the objection was raised, and the respondents cannot now fall back upon the objection when it was not persisted in. But, in the next place, it does not appear that Mr. Steward was one of the justices by whom the order in question was made, and so notice has not been duly given under 13 Geo. 2, c. 18, s. 5, which is imperative in this respect. In *The Queen v. The Justices of Hertfordshire*, it was held, under circumstances precisely similar, that the notice was not properly served.

[WIGHTMAN, J. Suppose a justice takes a part in every stage of the hearing except the final decision?]

LORD CAMPBELL, C. J. Or sits silent when the decision is given?]

There, probably, he would be presumed to consent to and to take part in the decision. But here Mr. Steward expressly declared that he would take no part in the hearing or decision, and he did not do so. Therefore, the presumption that he joined in the decision is rebutted.

[WIGHTMAN, J. It does not appear distinctly whether he referred to the documents before or after he made that declaration.]

It evidently must have been before. The fact of the name of a justice appearing in the caption raises no presumption that he was present when any particular order was made. *The Queen v. St. James, Colchester*, 20 Law J. Rep. (n. s.) M. C. 203; s. c. 4 Eng. Rep. 305.

Thirdly, this notice is on behalf of the inhabitants of Haughley at large. It ought to state who are the parties applying for the writ. *The Queen v. How*, 11 Ad. & E. 150. Inhabitants at large cannot appeal. *The Queen v. Colbeck*, 12 Ib. 161; s. c. 9 Law J. Rep. (n. s.) M. C. 61. Here there is no one liable for costs.

[WIGHTMAN, J. Would not the attorney be responsible?]

He cannot be appointed by the inhabitants generally. In *The Queen v. St. James, Colchester*, the notice was signed by the attorney for a particular inhabitant as well as generally for the inhabitants.

O'Malley and Power were not called upon to support the rule.

LORD CAMPBELL, C. J. This rule should be made absolute. I am glad for the sake of the due administration of justice in courts of Quarter Sessions that this application has been made. The proceeding which here took place is much to be censured. Mr. Steward was interested as being a rate-payer of the appellant parish, and if he had done his duty, he would have at once voluntarily withdrawn from the court. That is the example set by judges in Westminster Hall. Lord Holt, upon the hearing of a question in which he was personally interested, left the bench and sat by the side of his counsel, and I did so in the judicial committee of the privy council when I was chancellor of the Duchy of Lancaster. It was only yesterday that my brother Crompton retired from court during the hearing of a case in which he had been counsel when at the bar. In the present case, Mr. Steward declared that he would not interfere in the trial, and so far there seems to have been an acquiescence, but afterwards he does interfere. He takes upon himself indeed to swear as to the effect his observations and the pointing out parts of the documents might have had on the minds of the other justices, but he admits that he remained on the bench until the appeal was decided. He did not vote because there was no voting at all, but he still formed a member of the court, and his interference vitiated the proceedings, and there is no ground for saying that it was acquiesced in. With regard to the objection that the service of the notice was not upon two of the justices by and before whom the order was made, I quite agree with the decisions which have been cited. In the case decided by my brother Patteson, the justice had not interfered at all. He was only sitting

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on the bench, and under the circumstances in the light of a mere bystander. That is not the case here. Mr. Steward having remained until the decision took place, and having once interfered, it must be taken that the appeal was decided by and before him. The objection that the notice purports to be by the inhabitants has been already answered.

WIGHTMAN, J. It is most essential for the satisfactory administration of justice that parties who are interested in a decision should not only take no part in it, but also should give no ground for believing that they influence others in deciding. Here Mr. Steward interfered in the trial, if not by words certainly by his acts, so that the other justices might have derived some influence from him. That disqualifies the decision, and we ought to grant the *certiorari*. As to the other points, I quite agree with what has been said by Lord Campbell.

CROMPTON, J. The only question is whether an interested justice interfered in this case. It is said that he did not influence the decision of the rest of the magistrates, but that is not what is objected. What is objected to is not denied in the affidavits.

Rule absolute.

REGINA, on the prosecution of the Commissioners for Paving Goodman's Fields, v. THE EAST LONDON WATERWORKS COMPANY.

June 5th, 1852.

Paving Rate—Waterworks Company—Rate in respect of Mains and Pipes—Construction of 11 Geo. 3, c. 12.

By the 40th section of the local act, 11 Geo. 3, c. 12, the commissioners appointed by the act were empowered to make rates upon all persons who "shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments" within the streets, squares, &c., of a certain district, such rates not to exceed in any one year "the sum of 1s. 2d. in the pound of the yearly rents or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults, or other tenements or hereditaments respectively, as shall be situate in any of the said streets, squares, &c., the greater part or parts of which said streets, &c., respectively, shall be actually begun to be paved with new or other stones of a flat surface; and not exceeding 9d. in the pound of the yearly rents or yearly value of such of the said lands, &c., respectively, as shall be situate in any of the streets, squares, &c., which shall be actually begun to be new paved, the footways whereof shall be constructed with new or flat stones, and the carriage-ways whereof with the old stones which shall be taken up in the same or any other of the said streets, squares, &c., and not exceeding 6d. in the pound of the yearly rents or yearly value of such of the said lands, &c., as shall be situate in any of the said streets, squares, &c., which shall only be repaired by virtue or in pursuance of this act." The occupiers of houses situate at the corner of paved streets were made liable by a special provision to half of the rate only, and the act also contained special provisions as to the rating of public buildings and other specified property, but which had no express reference to the pipes and other pro-

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perty of a company for the supply of water. The commissioners were empowered by section 22, to alter the situation of the water pipes, &c., throughout the district.

Held, that under the 40th section an incorporated waterworks company was ratable in respect of the mains, pipes, and other apparatus laid down within the district of the commissioners.

This was an appeal against a rate made by the Paving Commissioners, under the 57 Geo. 3, c. 29, and the 11 Geo. 3, c. 12, to which the appellants were assessed in the sum of 37*l.* 10*s.*, and by consent, and under the order of Crompton, J., the following case was stated for the opinion of this court.

The rate was laid on the appellants in respect of land within the streets of the paving district in the possession of the company and occupied by their mains, pipes, and other apparatus, and for the enjoyment of such lands, and the right of laying their mains and pipes therein. The appellants are an incorporated company, established by act of parliament, for the purpose of supplying parts of the eastern part of the metropolis with water. By an act of incorporation of the said company (the 47 Geo. 3, sess. 2, c. 72 local and personal), amongst other powers and privileges conferred on the said company, they are, by section 32, empowered for the effectual purposes of the act to dig and break up the soil and pavement of any of the roads, highways, footways, and streets and public places of certain parishes and places therein mentioned, including the said parish of St. Mary, Whitechapel, and to sink and lay pipes, trunks, and other conveniences for the purposes aforesaid, and to put stop-cocks or plugs or branches from such pipes, trunks and other conveniences, in such places and in manner as shall be necessary for the aforesaid purposes, and do all such acts as the company should, from time to time, think necessary and convenient for completing, amending, repairing, improving and using the works authorized by the act.

The respondents are the commissioners acting under and in pursuance of the said acts of parliament of the 11 Geo. 3, c. 12, and 57 Geo. 3, c. 29, above mentioned. By the former of those acts (11 Geo. 3, c. 12,) the commissioners are empowered to pave the streets and ways of the district, and, in certain cases, to make, alter, and remove sewers, drains, and grates, and to cause the streets and ways to be watered, and to perform certain other matters in the said act specified.

The 36th section of the said act of the 11 Geo. 3, c. 12, enacts, "And for defraying the charges and expenses attending the execution of the several powers by this act granted, be it further enacted, that from and after the passing of this act, a rate or assessment (over and above all rates and assessments now payable) shall, once in every year, or oftener if it shall be thought needful by the said commissioners, or any seven or more of them, be made, laid and assessed by the said commissioners or any seven or more of them upon all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, cellar, vault or other tenements or hereditaments within any of the said streets, squares, lanes, courts, alleys, ways or other public passages, for raising such compe-

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tent sum and sums of money as the said commissioners or any seven or more of them shall, from time to time, think needful and direct, so as such rate or assessed rates or assessments do not in any one year exceed in the whole the sum of 1s. 2d. in the pound of the yearly rents or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults or other tenements or hereditaments respectively as shall be situate in any of the said streets, squares, lanes, courts, alleys, ways, and other public passages, the greater part or parts of which said streets, squares, lanes, courts, alleys, ways, or other public passages respectively shall be actually begun to be paved with new or other stones of a flat surface by virtue or in pursuance of this act; and not exceeding 9d. in the pound of the yearly rents or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults and other tenements or hereditaments respectively as shall be situate in any of the said streets, squares, lanes, courts, alleys, ways or other public passages which shall be actually begun to be new paved, the footways whereof shall be constructed with new or flat stones, and the carriage-ways thereof with the old stones which shall be taken up in the same or any other of the said streets, squares, lanes, courts, alleys, ways, or other public passages, by virtue and in pursuance of this act; and not exceeding 6d. in the pound of the yearly rents or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults, or other tenements or hereditaments, respectively, as shall be situate in any of the said streets, squares, lanes, courts, alleys, ways, or other public passages, which shall only be repaired by virtue or in pursuance of this act." That by the 24th section of the 57 Geo. 3, c. 29, it is enacted, "That it may be lawful to and for the persons who, under any local act or acts of parliament for any parochial or other district within the jurisdiction of this act, are empowered to make rates and assessments for the expenses of paving or keeping in repair the pavements of any streets or public places within such parochial or other districts, either separately or jointly with other purposes, from time to time, and at all times after the passing of this act for, and notwithstanding any provisions or restrictions, matters or things in such local act or acts of parliament contained, to make and sign all and every or any such rates or assessments as shall be, from time to time, necessary or expedient for paving or repairing the pavements of the streets and public places within such parochial or other district, pursuant to the directions of the local act or acts of parliament for such parochial or other district, or of this act; and for the payment of all debts or charges heretofore incurred or hereafter to be incurred in and about the execution of such local act or acts of parliament, and of this act or either of them, as to the paving and repairing the pavements of and in such parochial or other district, and for the payment of any interest or annuities charged or chargeable on the paving rates of the said parochial or other district, or for the payment of any principal moneys which may be due in respect thereof, either separately or jointly, or for other purposes, as to such persons shall seem reasonable and proper, not exceeding in amount in any one year double the sum or sums in the

pound, limited and fixed in the local act or acts of parliament for such parochial or other district as the rate or rates in the pound which may be made for and towards the charges of paving and repairing the pavements therein; and either separately or jointly with any other objects or purposes, except in such parochial or other district wherein the sum or sums in the pound, limited and fixed in the local act or acts of parliament for each of such parochial or other districts as such rate or rates in the pound, are, at the time of the passing of this act, limited and fixed at a sum not exceeding 1s. in the pound, and in any such parochial or other district not exceeding in amount in any one year treble the sum or sums in the pound so limited and fixed; and that such rates and assessments may be either substituted for the rates or assessments directed by such local act or acts of parliament to be made for or in respect of the paving and keeping in repair the pavements of such parochial or other district, either separately, or exclusively, or jointly with any other objects or purposes, or may be additional thereto, as the persons making the said rates or assessments from time to time at the making thereof may determine and direct; and that such rates and assessments, and also all rates or assessments made and signed from and after the passing of this act, for and in respect of or towards the paving or repairing the pavements of the streets or public places in any parochial or other district, and either separately or jointly with or towards any other objects or other purposes by virtue of any local act or acts of parliament, or by virtue of this act, shall be laid upon all and every person or persons who do and shall inhabit, hold, occupy, be in possession of, or enjoy any messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses or other buildings or hereditaments, situate or being within any of the streets or places within the said parochial or other district, and shall be just and equal pound rates, and shall be laid according to the annual rents or values of such messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses or other buildings and hereditaments respectively; and also that all rates or assessments hereafter made by virtue of this act shall be made and signed and allowed and published by the said persons, and in the same manner as hath been directed by the local act or acts of parliament relating to each particular parochial or other district, as to the rates or assessments for such parochial or other district, for and towards the expenses of paving and repairing the pavements therein, and either separately or jointly with any other objects and purposes by such local act or acts of parliament."

The respondents had paved and repaired the streets, ways, and public places of the said district, and otherwise acted in the execution of the several powers by the said act of the 11 Geo. 3, c. 12 granted; and the district of the said commissioners is within the jurisdiction of the said act of the 57 Geo. 3, c. 19. The appellants are the owners and possessed of certain main and branch pipes, with the cocks and plugs belonging thereto, running underground through the streets, squares, lanes, courts, alleys, ways, and other public passages

in various parts of the district embraced by the said act of parliament of the 11 Geo. 3, c. 12, and within the limits of the jurisdiction of the respondents as such commissioners; and which parts of the said district have been paved and repaired, and over which the said commissioners have otherwise exercised the powers of the last-mentioned act, for the purpose of conveying water, through which main and branch pipes water is conveyed by the appellants to the inhabitants of such district and others. That the plugs and stop-cocks inserted in the various parts of the said pipes are enclosed in smaller pipes, the extremities of which last-mentioned pipes terminate in iron boxes, which rise to and form part of the surface of the said streets and ways and public places within which the same respectively lie, and are stamped with the initial letters of the company. The appellants had been possessed of their mains and pipes, with the plugs and cocks belonging thereto within the district for upwards of thirty years, and until the year 1851 were never assessed to a paving rate, or any rate whatever, for the said district under the said acts of the 11 Geo. 3, c. 12, and the 57 Geo. 3, c. 29, or either of them; but the said company have, from time to time, been assessed to and have paid the rates for the relief of the poor and for the maintenance of the police, and the rate for lighting and cleansing the streets and other public places in the parish of St. Mary, Whitechapel, and the rate for repairing the church of the said parish, which rates have been, from time to time, assessed by virtue of a statute passed in the forty-sixth year of the reign of his Majesty King George the Third, for the maintenance of the poor within the parish of St. Mary, Whitechapel, and for keeping a nightly watch, and for cleansing the streets of the said parish, and raising money to repair the church of the said parish. By the 53d section of that act it is enacted, "That the rector, church-wardens, overseers of the poor and vestry-men, or any nine or more of them, should make and sign three distinct rates or assessments, not exceeding the amount of the respective sums thereinbefore directed to be settled and ascertained, upon all and every the person and persons who do and shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse or other building, tenements or hereditaments; that is to say, one rate for the relief of the poor, one other rate for the repairs of the church, and one other for cleansing the streets and regulating a nightly watch in certain parts of the said parish."

The form and amount of the rate, or of the assessments on the company, if the company be ratable, were not in dispute.

If the court should be of opinion that the appellants were, under the circumstances aforesaid, liable to be rated in respect of the said mains, pipes, plugs, cocks, and apparatus, or the pipes thereof, or in respect of any of them, or of the lands, ground, or space which they or any of them occupy, the said rate was to be confirmed; but if the court should be of the contrary opinion, then the said rate was to be quashed or amended by striking out the assessment on the appellants; the parties thereby agreeing that a judgment in conformity with the decision, and for such costs as the court should adjudge, might be entered on motion by either party at the general Quarter Sessions of

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the Peace for the county of Middlesex, next, or next but one, after such decision should have been given.

Pashley, for the respondents. Under the 43 Eliz. c. 2, it has been decided that water and gas companies are ratable — *The King v. The Corporation of Bath*, 14 East, 609; *The King v. The Rochdale Waterworks Company*, 1 M. & S. 634; *The King v. The Brighton Gas Light Company*, 5 B. & C. 466; s. c. 4 Law J. Rep. K. B. 213. And here the terms of the rating clause, section 40, of the 11 Geo. 3, c. 12, are more general.

[ERLE, J. The ability of the inhabitants was the limit under the 43 Eliz. c. 2; but that is not so under the statute now in question.]

Section 40 makes persons liable to the rate in respect of occupation, independently of their ability. "Land" is expressly mentioned amongst the subjects made liable to the rate; and the words "lands" and "grounds" occur in section 24 of the 57 Geo. 3, c. 29. The omission of the word "land" was relied upon in the cases of *The King v. The Manchester and Salford Waterworks Company*, 1 B. & C. 630, and *The Queen v. The East London Waterworks Company*, 21 Law J. Rep. (n. s.) M. C. 49; s. c. 9 Eng. Rep. 271. The company have submitted to the highway rate under the local act, the 46 Geo. 3, c. 89. He also referred to *The King v. Foleshill*, 2 Ad. & E. 593; s. c. 4 Law J. Rep. (n. s.) M. C. 63, and *The King v. The Trustees for Paving Shrewsbury*, 3 B. & Ad. 216.

Bovill, contra. There are provisions in the statute 11 Geo. 3, c. 12, which show that the legislature did not intend to include the mains and pipes of this company under the word "land" in section 36. The company are not inhabitants or persons passing through the streets within the preamble, which recites, "that it would be of great benefit and advantage to the inhabitants of the said streets, squares, lanes, courts, alleys, ways, and other public passages, and to all persons resorting thereto, or passing through the same," if they were properly paved, and that "the inhabitants of the said streets, squares, lanes, courts, alleys, ways, and other public passages, are willing to pave the same at their own expense," but that the same could not be effected without the aid of parliament. The company will not be benefited by the application of the money raised by the rate, and, therefore, should not incur the liability to it. *The Constables, &c. of Chorlton-upon-Medlock v. Walker*, 10 Mee. & W. 742; s. c. 12 Law J. Rep. (n. s.) Exch. 88. Section 42 subjects the occupiers of houses situate in the corner of paved streets to half only of the rate at which they would have been rated if they had stood wholly within the paved streets, which shows an intention that property should be burthened with the rate in proportion to the benefit derived from the operations of the commissioners. When the legislature intends to deal with the pipes, it mentions them, as in sections 16 — 19, relating to their repair and position. There are also special provisions (sections 46, 47, and 48,) as to the rating of public buildings, dead walls, void spaces of ground, meeting-houses, untenanted

lands, and empty houses, but the mains and pipes of the company are not mentioned. By section 22, the paving commissioners have power to alter the position of the pipes and plugs of the company, which shows that the company have not the occupation or enjoyment of the land, but an easement for the benefit of the public.

[LORD CAMPBELL, C. J. It may be a movable freehold. The company could maintain trespass for breaking the pipes.]

If these pipes are ratable, the sewers would be ratable. Sections 15, 16, and 22, of the Metropolitan Paving Act, 57 Geo. 3, c. 129, gives the paving commissioners power to enforce various regulations upon the water and gas companies. By section 52 of that act, and section 10 of the local act, the pavement, stones, and other materials placed in the streets are vested in the commissioners.

[ERLE, J. In the statute 43 Eliz. c. 2, lands and coal mines were mentioned, and it was argued that other mines were not intended, because coal mines were expressly mentioned, and, therefore, subterraneous occupation was not intended. Does section 36 show that the legislature contemplated surface land? By that section there is to be a different degree of ratability according to the state of the pavement. The pipes pervade the streets, whether they are paved or not, or only paved in part. The water pipes are distinct from the pavement above them. It would require a calculation of how many feet of pipes were under paved street, how many under street partly paved, and how much under ground not paved.]

That enactment shows the legislature intended that only the ordinary subjects of tenancy should be rated, and therefore the word "land" in section 40 is to be understood in its popular sense. In *The Governor of Chelsea Waterworks v. Bowley*, 20 Law J. Rep. (N. S.) Q. B. 520, s. c. 7 Eng. Rep. 376, it was held, that the power of a waterworks company to lay down its pipes was in the nature of an easement, and that they were not holders of land or of an hereditament within the meaning of the Land-tax Acts.

Pashley, in reply. A house and garden would be liable to a different amount of rate, when it is extended over a part differently paved, under section 36. The company is benefited by the protection which its property enjoys, as well as by the increased facility of conveying materials for repairing it. It was decided in *Crease v. Sawle*, 2 Q. B. Rep. 862, that all occupiers of every description of real estate were liable to be rated.

[ERLE, J. The words "lands and houses" rather show that the legislature intended the land which might be superficially enjoyed, inasmuch as land, by itself, would have included houses.]

And yet a gas company is ratable. *The King v. The Brighton Gas Company*.

[ERLE, J. Would you contend that the commissioners of sewers were ratable?]

They are for public purposes, not for profit, and would not be ratable more than the surveyors of highways. A water company is a commercial company, distributing water for profit. (He was then stopped.)

LORD CAMPBELL, C. J. By section 40 of the statute 11 Geo. 3, c. 12, the rate is to be made upon every person who is the occupier of "any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments." Those are the very words of the section of the statute 43 Eliz. c. 2, under which real property is ratable; and we are to see what construction has been put upon those words. By a long series of cases, beginning with *The King v. The Corporation of Bath*, and including *The Queen v. The Brighton Gas Light Company*, it is settled that such a company is ratable in respect of their pipes, to the relief of the poor, under the statute 43 Eliz. c. 2, as occupiers of land. That being so, there is no reason why the same construction should not be put upon the same words employed in this act of parliament. In *The King v. The Manchester and Salford Waterworks Company*, the pipes were held not ratable, on the ground that the word "land" was not in the statute, and that the general words "tenements and hereditaments" were to be considered as referring to matters *ejusdem generis* with those previously enumerated. And in the recent case between the hamlet of Mile End Old Town and this company, *The Queen v. The East London Waterworks Company*, we proceeded upon the same ground. It may be inferred that if the word "land" had been found in the act, the court would in both those cases have held the company ratable. *The Governor of the Chelsea Waterworks Company v. Bowley*, proceeded upon the peculiar words of the Land-tax Act, 58 Geo. 3, c. 5, by which the tax is laid upon all persons "having or holding" any lands or hereditaments; and we most cautiously avoided interfering with the decisions upon the statute 43 Eliz. c. 2. In that case the company did not appear to have any interest in land; and therefore we held that they were not liable under the Land-tax Act. Here the land is used and occupied by the company for their pipes; and there is nothing in the Paving Act to show that such property was intended to be excluded from the rating clause. This company derive benefit from the operations of the paving commissioners; and though the situation of their pipes may be altered by the commissioners, still, wherever their pipes are, the company are in the lawful occupation of the soil. Therefore, I am of opinion that the rate was properly made upon the company.

COLERIDGE, J. I am of the same opinion. I do not proceed upon the supposed occupation of the surface of the soil by the plugs of the company: that, I think, is quite unnecessary; and, indeed, the paving commissioners are more in the occupation of the surface of the ground than the company. I regard the case as if the surface and subsoil were in the occupation of different persons; as where there is an owner of the surface and an owner of the mine below it. Where the same words occur in enactments having in view the same general object, it is desirable to preserve uniformity of construction. In *The Queen v. The East London Waterworks Company*, we held that the words "tenements and hereditaments" should receive a restricted construction, because they followed words of a

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restricted meaning. By holding this property ratable, we do not infringe, but act upon the distinction laid down in the cases.

ERLE, J. The question is, whether this property is made ratable by section 40 of the statute 11 Geo. 3, c. 12, which imposes a rate on the occupier of "any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments." In some cases it has been held, that general words should receive a restricted construction; but I am not able to find, in this act of parliament, any restriction upon the meaning of the word "land."

CROMPTON, J. It has been held, that the general words, "tenements and hereditaments," in a rating clause, where the word "land" was omitted, do not extend to property of this description. But here the word "land" is in the rating clause. The only doubt which I have felt was created by reason of section 40 laying a smaller charge on the lands and houses situate in streets not paved, and the streets not paved with flat stones, than on those situate in streets paved with flat stones; but that provision is not sufficient to restrain the clear chargeability imposed by the preceding words.

Judgment for the respondents.

REGINA v. ARNOLD.¹

June 18, 1852.

Pauper Lunatic — Burthen of Maintenance — Birth in Ireland — Irremovability under 9 & 10 Vict. c. 66 — No known Settlement — Liability of Union — 12 & 13 Vict. c. 103, s. 5.

The 12 & 13 Vict. c. 103, s. 5, extends to the maintenance of a pauper lunatic, born in Ireland, who has acquired no settlement in England, but has become irremovable by reason of five years' residence in a parish within an union in England; and in such a case the burthen of maintaining the pauper in an asylum is cast upon the common fund of the union.

THIS was an order, dated the 3d of February, 1852, and made by T. J. Arnold, Esq., one of the magistrates of the police courts of the metropolis, and directed to the guardians of the poor of the Whitechapel Union in the county of Middlesex, and to the clerk of the peace of the said county. The order recited, upon the complaint of the relieving officer of the Whitechapel Union, that the pauper was chargeable to the common fund of the said union, and was confined in the lunatic asylum for the county, at the cost and expense of the

¹ 21 Law J. Rep. (N. S.) M. C. 180.

common fund of the said union; that he was not legally settled in any parish in the said union, and had not acquired a settlement in any parish or place in England; that he was an Irishman, and while resident in the parish of Christ Church, in the said union, became chargeable to the said parish, but was afterwards made chargeable to the common fund of the said union by reason of a five years' residence in the said parish; that he was sent to the said county asylum, from the said union, on the 28th of May, 1851, and had ever since been confined in the said asylum; that at the time of such removal he had resided in Christ Church parish for five years and upwards, and would, if not lunatic, have been irremovable out of the said parish by reason of the 9 & 10 Vict. c. 66, if such statute were applicable to the case of an Irishman residing in a parish in England, and not having gained any English settlement. The order then adjudged the pauper to be chargeable to the said county of Middlesex; and, thereupon, another order was made on the same day, directed to the treasurer of the said county, requiring him to pay to the treasurer of the said union the expenses attending the examination, conveyance, and maintenance of the pauper.

The facts, as above recited, were admitted on both sides.

Pashley (May 24th) moved for a rule, calling on the magistrate, who made the orders, and the guardians of the poor of the White-chapel Union, to show cause why the above orders should not be quashed. The question is whether the county or the union is bound to maintain a pauper lunatic born in Ireland, who, if sane, would have been irremovable by reason of five years' residence, and has not gained any settlement in England. If the pauper had been sane, he might, but for the 9 & 10 Vict. c. 66, s. 1, have been sent to Ireland under the 8 & 9 Vict. c. 117, s. 2, and the operation of the 12 & 13 Vict. c. 103, s. 5, is to throw the burthen, in a case like this, upon the common fund of the union. The liability of the county, under the 8 & 9 Vict. c. 126, ss. 59, 63, is by that statute, transferred to the union. He referred to *The Queen v. Wigton*, 20 Law J. Rep. (N. S.) M. C. 110; s. c. 2 Eng. Rep. 248.

Bodkin showed cause in the first instance. No doubt a pauper born in Ireland is entitled to the benefit of a five years' residence. Here the question is, whether a lunatic, having no known settlement in England, comes within the meaning of the 8 & 9 Vict. c. 126, ss. 59, 63. The statutes previous to the 12 & 13 Vict. c. 103, make no reference to persons having no known place of settlement, and the 5th section of this latter act cannot fairly be construed to apply to such persons. It was by reason of the hardship to some one parish in the case of irremovability that the legislature enacted that the burthen should be thrown on the common fund of the union. The latter part of the 5th section and the 3d section throw light on the question, and go to show that it was not intended to transfer the burthen in this case from the county to the union. The union is

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entitled to the same benefit in this case as the parish in which the five years' residence took place.

Pashley. The 5th section is not to be read as if the words "having a settlement in England" were in it. An Irishman and an Englishman are placed in just the same situation. The Irishman is liable to removal to Ireland, and is as much exempt from removal by a five years' residence as an Englishman; and if so, the union in this case must be held liable to support the pauper.

Cur. adv. vult.

The judgment of the court¹ was delivered by —

LORD CAMPBELL, C. J. In this case the question is raised whether the expense of maintaining a pauper lunatic, who was exempt from removal by five years' residence, and who is without a settlement in England, being Irish by birth, and found to have gained none, is to be borne by the union or county. And we are of opinion that it is cast upon the former by the 12 & 13 Vict. c. 103, s. 5, enacting that the costs of the order for removal and maintenance in the case of a lunatic pauper, so exempt, shall be borne by the union. This is admitted in the case where the lunatic pauper has a settlement, and if full effect is given to the words, they include also lunatic paupers who have no settlement. In the first case it transfers the burthen from the parish of settlement to the union within which the five years' inhabitancy took place, upon the principle that such inhabitancy has many of the properties of a settlement; and we see no reason why the legislature should not have intended to make a transfer from the county to the union in the latter case, as it has used words wide enough so to operate, and the reason for the transfer applies equally in both cases.

Rule absolute.

REGINA, on the prosecution of THE MAYOR, &c., OF ASHTON-UNDER-LYNE, *v.* SLATER.²

April 28th, 1852.

Highway Rates — Borough of Ashton-under-Lyne — Construction of 12 & 13 Vict. c. 35, and 10 & 11 Vict. c. 34.

By the Ashton-under-Lyne Improvement Act, 12 & 13 Vict. c. 35, s. 25, power is given to the mayor, aldermen, and burgesses, to make and levy a highway rate upon the occupiers of all messuages, houses, &c., lands, tenements, and hereditaments within the borough, for

¹ LORD CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

² 21 Law J. Rep. (N. S.) M. C. 185; 16 Jur. 992.

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maintaining and repairing "the present highways, within the borough, when sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, &c., and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewers under the same." The borough of Ashton-under-Lyne consists of a part of one of the four divisions of the parish of Ashton-under-Lyne, and the whole of another of such divisions, the latter being subdivided into two districts; and before the passing of the above act each of such districts separately maintained its own highways, and had its own surveyor. The greater part of one district was a country district. After the passing of the said act, the mayor, &c., acting as surveyors, laid a rate on the ratable property within each of the said districts, exclusively for the repair of such highways within them as had not been sewered, drained, levelled, paved, flagged, and otherwise completed to the satisfaction of the mayor, &c.:—

Held, that under the above section of the special act, taken in connection with sections 48 and 49, of the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, the mayor, aldermen, and burgesses of the borough were empowered to make two general rates within the borough, one for the repair of the urban streets within the 25th section of the special act, and the other for the repair of the rural ways not within that section, and, therefore, that the rate in question was bad.

THIS was an appeal against an assessment to a highway rate, made and published in May 1851, for the Old Town division of the borough of Ashton-under-Lyne, by virtue of the 5 & 6 Will. 4, c. 50, made by the town council of the said borough, as surveyors, under the Towns Improvement Clauses Act, 1847, and the Ashton-under-Lyne Improvement Act, 1849. Notice of appeal against the said rate was duly given, and, by consent of the parties, and under an order of Patteson, J., the following case was stated for the opinion of this court, under the Quarter Sessions Procedure Act.

The parish of Ashton-under-Lyne, in the county of Lancaster, consists of four divisions, called respectively, "The Ashton Towns Division," "The Audenshaw Division," "Hartshead Division," and "The Knott Lanes Division." Of these the Ashton Towns division is again subdivided into two districts or sub-divisions called respectively "The Old Town" and "The Demesne." The municipal borough of Ashton-under-Lyne consists of the Ashton Towns division of the said parish (including the said two districts or sub-divisions) and of part of the Audenshaw division. Up to the time of the passing and coming into operation of the Ashton-under-Lyne Improvement Act, 1849, the said Audenshaw, Hartshead, and Knott Lanes divisions maintained each separately its own highways, and had each separate surveyors, and the said Old Town and Demesne districts of the said Ashton Towns division maintained each separately its own highways and had each separate surveyors. The greater portion of the Old Town district is a country district; the Demesne district is nearly altogether covered by the town, and comprises a great quantity of houses and other ratable property. After the passing of the Ashton-under-Lyne Improvement Act, 1849, the mayor, aldermen, and burgesses required the surveyors of the Old Town and Demesne divisions, respectively, to hand over to them all books and papers in their power and custody as such respective surveyors, and the said respective surveyors forthwith delivered the same accordingly. Long before and at the time of the passing of the said Ashton-under-Lyne Improvement Act, 1849, and up to and at the time of the making, allowing, and publishing the said rate now appealed against, there were and still are many public and common

highways both in the Old Town division and also in the Demesne division. Some of the highways within each of such divisions, respectively, had been, before the making and laying of the rate now appealed against, sewered, drained, levelled, flagged, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses of the said borough, and were, after the passing of the Ashton-under-Lyne Improvement Act, 1849, and before the laying of the said rate appealed against, declared to be so sewered, drained, levelled, flagged, paved, and otherwise completed to such satisfaction, and had been declared to be public highways, and have been kept in repair out of moneys levied under and by virtue of the 25th section of the said last-mentioned act by the rates of February and December, 1850, hereafter mentioned. Others of the highways within the said Old Town division and the said Demesne division have never yet been sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the said mayor, aldermen, and burgesses, and have never yet been certified or declared to be sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the said mayor, aldermen, and burgesses, nor declared to be public highways within the meaning of the said Ashton-under-Lyne Improvement Act, 1849. In the month of May, 1851, and after the passing of the said last-mentioned act, certain highways in the Old Town division, which were not at that time sewered, drained, levelled, paved, flagged, and otherwise completed to the satisfaction of the said mayor, aldermen, and burgesses, being then out of repair, the said mayor, aldermen, and burgesses assuming to be, and acting as surveyors of the said Old Town division, assessed and laid the rate in question upon the ratable property in the said Old Town division, for the repair only of such highways within that division as had not, at the time of the assessing and levying of such rate, been so sewered, drained, levelled, paved, flagged, and otherwise completed; and at the same time assuming to be, and acting as surveyors of the Demesne division, they assessed and laid another rate upon the ratable property within the Demesne division, for the repair of highways within that division exclusively, namely, for the repair only of such highways then out of repair within that division as had not been, at the time of the assessing and levying of the said rate, sewered, drained, levelled, paved, flagged, and otherwise completed to such satisfaction as aforesaid. The said respective rates are laid upon the ratable property within the said respective districts, to the exclusion of all other ratable property within the said borough, but not within the said respective districts. The respondents occupy ratable property within the said borough, but not within the Old Town district, or subdivision thereof, and ought to be included in any rate made for the repair of highways, and laid upon the said borough at large, but not rates, if any, which can be legally assessed and laid upon the said Old Town district or subdivision, exclusively of the rest of the borough. There is within the said Old Town district land used as arable land only, land used as meadow land only, and land used as pasture ground only; the occupiers of these lands respectively are rated in and by the said rate accord-

ing to the full net annual value of such respective lands, and this appears on the face of the said rate. In the month of February, 1850, the mayor, aldermen, and burgesses of the said borough, laid a highway rate of 2*d.* in the pound on all ratable property within the said borough, under the authority of the Ashton-under-Lyne Improvement Act, 1849. This rate was collected early in the year 1850, and expended in the repair of the highways throughout the whole borough, whether declared as such or not. In the month of December, 1850, the mayor, aldermen, and burgesses of the said borough, laid another rate of 1*d.* in the pound, under the authority of the Ashton-under-Lyne Improvement Act, 1849. This rate was laid on all the property within the whole borough, and expended in the repair of those highways only which had been declared as such under the Ashton-under-Lyne Improvement Act, and which have been paved, sewered, &c., to the satisfaction of the corporation. The Ashton-under-Lyne Improvement Act, 1849, applies to the same district as that comprised within the municipal borough of Ashton-under-Lyne, the limits of both being co-extensive. The Old Town division of the borough of Ashton-under-Lyne, mentioned in the rate appealed against, is the same with the Old Town district or sub-division of the borough of Ashton-under-Lyne mentioned in this case. The mayor, aldermen, and burgesses of the said borough of Ashton-under-Lyne are the commissioners intrusted by the Ashton-under-Lyne Improvement Act, 1849, with powers for executing the purposes thereof, and they have no revenues, moneys, or other means applicable to the repair of any highways within the said borough, except such moneys as they may be entitled to raise by rates under the authorities of the several statutes in that behalf provided.

The question for the opinion of this court was, whether the mayor, aldermen, and burgesses of Ashton-under-Lyne, in the month of May, 1851, under, and by virtue of the Ashton-under-Lyne Improvement Act, 1849, and the acts incorporated therewith, and the 5 & 6 Will. 4, c. 50, or any or either of these acts, or any other statute then in force, were entitled to assess and levy the said rate upon the ratable property within the Old Town division exclusively, for the repair of such highways within that division as had not been at the time of the assessing and laying of that rate, declared to be and were not sewered, &c. If the court should be of opinion that they were so entitled, then this rate was to be confirmed; if the court should be of the contrary opinion, it was to be quashed. And it was thereby agreed by and between the said appellant and the said respondents, and each of them, that a judgment in conformity with the decision of this court, and for such costs, if any, as this court should adjudge, (and it was thereby agreed that this court should have full power and authority to adjudicate upon the costs of the said appeal, and of this case), might be entered on motion by either party, at the Court of General Quarter Sessions of the Peace for the county palatine of Lancaster, to be holden by adjournment at Salford, next, or next but one, after such decision should have been given, and that such judgment should and might be entered up accordingly, and

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that the said rate might be amended, if and as the court should so direct.

Cowling (*Spinks* with him) argued on behalf of the appellant.

H. Hill (*Maynard* and *Milward* with him) for the respondents.

They referred to sections 2, 3, 13, 48, 49, 161, 162, 167, 199 of the Towns Clauses Improvement Act, 10 & 11 Vict. c. 34; section 27 of the Highway Act, 5 & 6 Will. 4, c. 50; and sections 13, 20, 24, 25, and 31, of the 12 & 13 Vict. c. 35,¹ entitled "An Act for the further improvement of the borough of Ashton-under-Lyne."

LORD CAMPBELL, C. J. I am of opinion that the rate cannot be supported; not, however, on the ground taken by Mr. Hill, in the first

¹ Section 13. "That the Towns Improvement Clauses Act, 1847, the Town Police Clauses Act, 1847, and the Markets and Fairs Clauses Act, 1847, shall, except in so far as herein varied or otherwise provided for, be incorporated with and form part of this act."

Section 20. "That if any street or part of a street, whether the same be a public highway or not, or whether the same be already or shall, at any time hereafter, be laid out and opened to the public within the said borough, be not or shall not be sufficiently sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses, it shall be lawful for the mayor, aldermen, and burgesses, at any time, and from time to time, after the passing of this act, notwithstanding the provisions of the Towns Improvement Clauses Act, 1847, incorporated herewith, to order that any such street or part thereof shall be freed from obstruction, sewered, drained, levelled, flagged, paved, and otherwise completed, according to such plan, on such level, in such manner, of such materials, and within such time as they shall direct, and thereupon the respective owners of the buildings and lands lying alongside of or adjoining to such street or part of a street (notwithstanding any part of such street may include, pass over, lie opposite, or be adjacent to any cross or other street, or any part thereof), shall, according to such plan, on such level, of such materials, within such time, and in such manner as shall be expressed in such order, at their respective charges and expenses, remove all obstructions, and well and sufficiently sewer, drain, level, flag, pave, and otherwise complete such street, so far as the same extends along their respective buildings or lands, and in the event of such owners or any of them making default in the due execution of such work within such time as aforesaid, the mayor, aldermen, and burgesses may cause such work to be executed, and may recover the expense incurred by them in respect thereof, in the manner directed by the provisions of the Towns Improvement Clauses Act, 1847, with respect to ensuring the execution of the works by that or the special act required to be done by the owners or occupiers of houses or lands, so far as such provisions apply to the recovery of the expense of works required to be done by owners, and except in so far as such provisions authorize the recovery of such expense by drainage rates."

Section 24. "That when and so soon as any street already made or hereafter to be made within the said borough shall have been sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses, then, and in each such case, it shall be lawful for the mayor, aldermen, and burgesses, and they are hereby required to certify and declare the same to be a public highway, and after such certificate and declaration the same shall be a public highway, and the same, together with the main sewer under the same, shall be forever afterwards repaired and repairable as such, out of the highway rate hereinafter provided, and every such certificate and declaration shall be recorded in the books of the mayor, aldermen, and burgesses."

Section 25. "That for the purpose of maintaining and repairing the present highways within the borough when so sewered, drained, levelled, flagged, paved, and other-

part of his argument, that there can only be one highway rate within the borough, which is to be applied to all purposes of repair, both of the rural and urban highways within the district. Section 25 of the 12 & 13 Vict. c. 35, will not bear that interpretation. By that section, the "highway rate" authorized to be levied upon the occupiers of buildings and land within the borough, is to be applied to the repair of such streets only as come within the description therein given. It seems to me, looking to the general act, the 10 & 11 Vict. c. 34, together with the special act, that the legislature intended there should be two general rates within this borough for the whole district, one for the repair of the urban ways, and the other for the rural ways within the district. The rate is to be upon all lands within the borough, so that the rural part of the district is made to contribute to the repair of the urban ways, and the urban part would, therefore, be fairly required to contribute to the repair of the rural ways; and that seems to me to be provided for by the 48th section¹ of the 10 & 11 Vict. c. 34, which, I think, confers upon the commissioners the power of making a rate for the repair of the rural roads within the borough, treating it as one district, although there may have been separate districts with separate liabilities before the passing of the act. Mr. Cowling, in his argument, was obliged to admit that they had the power where part of the road was within the borough and part excluded from it, and that there was no immemorial usage. It is true there is no such express power given by the act, but there is, I think, an implied power. A difficulty was raised from the language of the 49th section²

wise completed to the satisfaction of the mayor, aldermen, and burgesses as aforesaid, and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewers under the same, it shall be lawful for the mayor, aldermen, and burgesses, when and so often as they shall think necessary, to order and direct a rate or assessment, to be called 'the highway rate,' to be made and levied upon the occupiers of all messuages, houses, shops, workshops, &c., lands, tenements, and hereditaments, whatsoever, already built, erected, or situate, or which shall hereafter be built, erected, or situate, within the said borough, according to the full net annual value of the same respectively."

Section 31. "And in order to raise money for carrying into execution the purposes of this act so far as not otherwise provided for herein, or in the acts incorporated herewith, be it enacted, that it shall be lawful for the mayor, aldermen, and burgesses, when and so often as they shall think necessary, to order and direct a rate or rates, assessment or assessments, to be made and levied upon the occupiers of all messuages, houses, shops, workshops, &c., lands, tenements, and hereditaments whatsoever, already built, erected, or situate, or which shall hereafter be built, erected, or situate within the said borough."

¹Section 48. "The commissioners, and none other, shall be the surveyors of all highways within the limits of the special act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of laws for the time being in force; and the inhabitants of the district within the said limits shall not, in respect of any lands situate within the said district, be liable to the payment of any highway rate, grand jury cess, or other payment in respect of making and repairing roads within the other parts of the parish, township, barony, or place in which the said district, or any part thereof, is situate."

²Section 49. "The commissioners shall be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special act,

Regina v. Slater.

of the 10 & 11 Vict. c. 34, but that seems to me merely to provide that, if the commissioners fail to do their duty, they shall be liable to an indictment as before. I do not think it necessary to refer to the other sections. They all seem to me to be reconcilable with this conclusion, that there are to be two rates, one for the repair of the urban ways, and the other for the repair of the rural ways, and that all property within the borough is to contribute to those rates.

WIGHTMAN, J. I am of the same opinion. There may be a difficulty in reconciling some of the provisions; but taking both the acts together, it seems to me the effect is this, that there are to be two rates, which may be applied to two kinds of repairs within the borough, one of which may be termed the repair of the urban streets, though only in part within the borough, and the other the repair of the ways not within the 25th section of the special act. And this leads to no hardship, because the inhabitants of the rural district are bound to contribute to the repair of the urban streets, and there is no reason why there should not be a reciprocity as respects the rural ways. It is quite consistent with the 48th section that this should be so, and the difficulty raised as to the provision contained in the 49th section has been sufficiently met by the observations of my lord.

ERLE, J. I also think that the rate is bad. The words of the 48th section are capable of the construction that the whole borough shall become one entire district, and the observations of the court, as to the powers of the commissioners, are nearly conclusive to show that they are bound to treat the borough as one district, and to make the rural part contribute to the repair of the urban ways. If the contention on the other side were maintainable, the rural district would have to repair the rural ways as well as the ways within the urban district, without any assistance from the urban district. Besides, with separate districts and shifting liabilities, great complication of proceeding would arise under the 49th section, for no intelligible purpose, and many other inconveniences. There is nothing that I can see to prevent the whole district being made liable, and it is a great recommendation that for the future all difficulty as to liability will be done away with. An indictment will charge the liability just as the common liability of a parish.

Judgment for the appellants.

and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special act."

REGINA v. THE INHABITANTS OF HUSHWAITE.¹

May 1, 1852.

Settlement by Joint Tenant—Renting a Tenement—Payment of Rates—Constructive Assessment and Payment—1 Will. 4, c. 18; 4 & 5 Will. 4, c. 76; 3 & 4 Will. & M. c. 11.

William Atkinson occupied a separate and distinct dwelling-house and farm in the parish of H., which were let to him and his father, Thomas Atkinson, as joint tenants, the rent and value of the land itself being sufficient to confer a settlement on both. The father resided on another farm, at a distance, but he *bonâ fide* paid the rent of the farm occupied by his son. In the rate-books of H., "Mr. Atkinson" appeared as the name of the occupier of the house and farm in respect of two rates, and in a third rate the name of "Thomas Atkinson" appeared. The overseers had demanded and received payment of these rates from the father:—

Held, that the sessions were justified in finding, first, that there was a sufficient occupation and payment of rent, as well as a sufficient assessment to and payment of rates, to confer on William Atkinson a settlement in H., under the 1 Will. 4, c. 18, and 4 & 5 Will. 4, c. 76; and, secondly, that he had sufficiently been charged with, and paid his share of the public taxes, to gain a settlement in H., under the 3 & 4 Will. & M. c. 11.

THIS was an appeal against an order for the removal of Ursula Atkinson, wife of William Atkinson, who had absconded to America, and her five children, from the parish of Knuyton-with-Brawith, in the North Riding of Yorkshire, to the parish of Hushwaite, in the same riding. The sessions confirmed the order, subject to the following

CASE. The settlement stated in the grounds of removal was, that the pauper's husband, William Atkinson, had, at Lady-day, 1844, rented a house and farm in the appellant parish, at the rent of 70*l.* a year, for one whole year, ending at Lady-day, 1845, and paid the year's rent for the same, and that he was also assessed to the poor-rate of the township of Hushwaite, and paid the same in respect of the said dwelling-house and farm for one year, during which he so occupied the same, and that during the whole period of his occupancy he resided and slept in the township of Hushwaite. There were three grounds of appeal, traversing the residence, occupation, and payment of rates as stated in the grounds of removal, as follows:—First, that the said W. Atkinson did not acquire a settlement in the said township of Hushwaite, nor take and hire, at Candlemas, in the year 1844, of Mr. John Buckle, from year to year, commencing on the 6th of April, 1844, at the rent or sum of 70*l.* a year, a tenement, consisting of a separate and distinct dwelling-house, farm-house, or building, and twenty-five acres and upwards of land, situate in the township of Hushwaite, as, in the grounds of removal which accompanied the said order, is alleged. Secondly, that the said W. Atkinson did not hold and occupy the said dwelling-house and land under the said alleged hiring, in the said township, from the 6th of April, 1844, until the 6th of April,

¹ 21 Law J. Rep. (N. S.) M. C. 189; 16 Jur. 1068.

1845, nor did he pay the said yearly rent for the said term of one year, as, in the grounds of removal, is alleged. Thirdly, that the said W. Atkinson was not assessed to the poor rates of the said township of Huthwaite, nor did he pay the same rates in respect of the said dwelling-house and land for one year, during which it is alleged he so occupied the same, in manner and form as in the said grounds of removal is alleged. Before the appeal came on to be heard, certain admissions, entered into by the attorneys for the respective parishes, were received in evidence, and were as follows:— That at or about the time in that behalf mentioned in the respondent's statement, the pauper's husband, W. Atkinson, and his father, T. Atkinson, entered into an agreement with John Buckle, therein mentioned, the legal effect whereof was to give the said W. Atkinson and T. Atkinson a joint tenancy from year to year in the tenement, and at the rent in the respondent's statement respectively mentioned, commencing on the 6th of April, 1844. That the whole of the rent and the whole of the poor-rates in respect of the said tenement, for the year ending the 6th of April, 1845, were paid by T. Atkinson. At the trial of the appeal, after the above admissions had been put in, it was proved that the house and farm were in fact hired and rented by the pauper's husband and his father, T. Atkinson, as joint tenants. That the pauper's husband entered upon the farm at Lady-day, 1844, and from that time resided there, and managed the farm until Lady-day, 1845, the farming stock belonging to him; the father, T. Atkinson, continuing during the whole of the time aforesaid to reside upon another farm in the township of Balk, about five miles from the appellant township, and never sleeping at the farm in the appellant's township but for two nights during the tenancy, but that the whole of the rent of the said tenement in the appellant township was *bonâ fide* paid by the father, T. Atkinson, and that such tenement consisted of a separate and distinct dwelling-house and land, and that the land of itself, and independently of the said dwelling-house, was of sufficient value, and the rent paid in respect thereof was of sufficient amount, to confer a settlement on both the said W. Atkinson and T. Atkinson. In the rate-books of the appellant township for the year 1844 and 1845, the house and farm occupied by the pauper's husband was described as "buildings and lands," and "Atkinson, Mr." appeared in the column headed "name of occupier," as the person rated in two rates, made on the 18th of April and the 17th July, 1844; and in a third rate, on the 8th of January, 1845, "Atkinson, Thomas," was stated as the name of the occupier. The overseers of the appellant parish had always demanded and received payment of the rates in question from Thomas Atkinson, the father.

The appellants objected that there was no sufficient proof of renting a tenement, so as to confer a settlement on the pauper's husband, within the meaning of the 1 Will 4, c. 18, s. 1, and the 4 & 5 Will. 4, c. 76, s. 66, on the following grounds:— First, that no rent having actually been paid by the hands of the pauper's husband, the Court of Quarter Sessions could not infer that there was a sufficient payment of rent by him to satisfy that portion of the above statutes which requires the rent to be actually paid by the person hiring the tenement.

Secondly, that as the statute requires the tenement to be either a separate and distinct dwelling-house or building, or land, or both, that a joint tenancy of the house and farm in question did not confer a settlement in the said W. Atkinson. Thirdly, that if there was a sufficient payment of rent by the said W. Atkinson, there was no compliance with the requisites of the 4 & 5 Will. 4, c. 76, s. 66, the pauper's husband not having been assessed to, or having paid the rates within the meaning of that section. Fourthly, the appellants further objected that (in case there was no sufficient proof of a settlement by renting a tenement on the grounds above stated), there was no sufficient proof of a settlement by the payment of rates under the 3 Will. & M. c. 11, s. 6.

The Court of Quarter Sessions overruled the above objections, and found upon the evidence as above stated, — First, that there was a sufficient payment of rent by the son, (the husband of the pauper) to confer a settlement upon him. Secondly, that a joint tenancy of the land in question conferred a settlement on the said W. Atkinson. Thirdly, that the payment of rates by T. Atkinson, the father, was, in point of law, a payment of rates by the son so as to confer a settlement upon him. Fourthly, that the assessment and payment of rates above set forth, was such an assessment and payment of rates by the said pauper's husband, as (coupled with the renting the tenement above mentioned) did confer a settlement upon him under the provisions of the 1 Will. 4, c. 18, s. 1, and those of the 4 & 5 Will. 4, c. 76, s. 66. Fifthly, that in case the said assessment and payment of rates was not sufficient to enable the pauper's husband to obtain a settlement by renting a tenement under the last-mentioned statutes, the Court of Quarter Sessions found that it was such a charging with and payment of his share to the public taxes or levies of the parish of Hushwaite as would confer a settlement upon him therein, under the provisions of the 3 & 4 Will. & M. c. 11, s. 6.

If the Court of Queen's Bench should be of opinion that there was no evidence of settlement, either by renting a tenement or by payment of rates for the grounds above stated, then the order of sessions was to be quashed; but if the Court of Queen's Bench should be of a contrary opinion, then the order of sessions was to stand confirmed.

Rose (Lefroy with him), in support of the order. First, a settlement was gained by the pauper's husband by payment of rates and renting a tenement under the 3 & 4 Will. & M. c. 11, and the 6 Geo. 4, c. 57. The case of *The Queen v. St. Mary Calendar*, 9 Ad. & E. 626; s. c. 8 Law J. Rep. (n. s.) M. C. 54, points out the ground upon which such a settlement rests, as regards the mode of assessment and payment, and *The Queen v. The Inhabitants of St. Lawrence in Appleby*, 6 Q. B. Rep. 842; s. c. 14 Law J. Rep. (n. s.) M. C. 56, decides that one of two joint tenants of land whose renting is in other respects conformable to the 6 Geo. 4, c. 57, may gain a settlement under section 2 of that act. Here, the payment of one joint tenant, both being liable, is a payment by him on account of both, and the rate-books

show that the pauper's husband was sufficiently assessed to the rates.

[LORD CAMPBELL, C. J. The sessions must be taken to have found as a fact that he was the person rated.]

Then all the other requisites exist to make out a settlement by payment of rates. Secondly, as to the settlement by payment of taxes, under the 3 & 4 Will. & M. c. 11, s. 6, it is not necessary that the person who pays should appear to be charged by name. *The King v. The Inhabitants of Heckmondwicke*, 2 Dougl. 564.

[LORD CAMPBELL, C. J. Suppose a third party were to advance the money for payment on the credit of the pauper.]

That would be sufficient. *The King v. Bridgewater*, 3 Term. Rep. 550. This might have been pleaded as a payment by each of the joint tenants. He also referred to *The Queen v. The Inhabitants of Hulme*, 4 Q. B. Rep. 538; s. c. 12 Law J. Rep. (N. S.) M. C. 100, *The King v. Painswick*, Burr. S. C. 465, *The King v. Walsall*, Cald. S. C. 35, *The Queen v. The Inhabitants of St. Marylebone*, 15 Q. B. Rep. 399; s. c. 19 Law J. Rep. (N. S.) M. C. 201.

Bliss and Price, contra. It is not found that it was ever intended to rate W. Atkinson, or that "Mr. Atkinson" meant him. All that is found is simply payment of the rate. If there exists a patent ambiguity, "Mr. Atkinson" must be taken to mean "Thomas Atkinson." But supposing either may be meant, there is no evidence from which it can be inferred that "William" was meant, but there is a great deal to show that "Thomas" was meant. The principle upon which the cases on this point rests is, that the description is such as might be applied to the pauper, and could not be applied to another. In *Moss v. St. Michael, Lichfield, Pig. & Rodw.* El. Cas. 118, the principle applicable to a settlement by rating is carried out. It was there held, that payment by a joint tenant, of itself was not in effect a charging of him to the rate.

[LORD CAMPBELL, C. J. If you assume that Thomas was the only person assessed to the rate, then your objection may be good.]

There is nothing to show that the overseers treated any other person as occupier; and that, at least, should appear.

The pauper himself must be charged to, and have paid, the rate. No one is liable to the rate but the person rated, and the payment by Thomas was purely voluntary as regarded William. He could not have maintained an action of assumpsit against William in respect of it. Thomas being himself liable to the rate, the payment must be considered as made by him in discharge of himself alone. Then, as to the question of joint tenancy. The tenement meant by the statute is an entire tenement, the whole of which is occupied by a single tenant. *The King v. The Inhabitants of Birkswell*, 6 Ad. & E. 282; s. c. *nom.* *The King v. Balsall*, 6 Law J. Rep. (N. S.) M. C. 35, and the interest of a joint tenant, therefore, is not enough. This point is still left open by the case of *The Queen v. The Inhabitants of St. Lawrence in Appleby*.

[LORD CAMPBELL, C. J. You may contend that the decision is wrong. The point was certainly decided.]

The King v. The Inhabitants of Birkswell does not appear to have been referred to.

LORD CAMPBELL, C. J. If there was any evidence of either a settlement by renting a tenement or payment of rates, under the question submitted, we are to confirm the order, and I think there was evidence to justify the sessions in deciding as they did. In the first place, as to the settlement by renting a tenement, in *The Queen v. The Inhabitants of St. Lawrence in Appleby*, this court came to the conclusion that the statute 6 Geo. 4, c. 57, applied to premises that were held by joint tenants, and therefore I am of opinion that the circumstance of the joint tenancy in this case was immaterial, the value being sufficient to satisfy the statute. Then, as to the assessment of the pauper's husband, I think there was evidence of that. It may be presumed that the facts stated as to this were known to the parish officers, and if so, do they not afford some evidence that William was intended to be rated. As to the question of payment by William, there seems to me to be no doubt Thomas was a joint tenant with William, and having paid the rates, he might bring an action or suit in equity for compensation, or, all at events, in settling their joint accounts he would be entitled to take credit for the amount paid, and he would take credit for it as having been paid on account of himself and William. Supposing there had been a joint assessment, and Thomas had paid, clearly that would have been a payment by both. Here, therefore, there appears to be a sufficient holding, assessment, and payment, and that being so, a settlement was gained by the pauper's husband.

WIGHTMAN, J. We are to say whether there was any evidence to support a settlement, and as to that, two questions are raised; first, whether there was any evidence that William was assessed; and if any, then, secondly, whether he was shown to have paid the rates. There was clearly some evidence that William was assessed to the rates. It might be doubtful who was meant by "Mr. Atkinson," but there was evidence of his being in actual possession, and that the other joint tenant was living at a distance off. There was, therefore, some evidence from which the sessions might draw the inference of his being assessed. As to the question of payment, there is much more doubt. Considering William to be the person actually assessed, no doubt he would be *primâ facie* liable to pay, and be taken to have paid; but payment is in fact made by Thomas, whose name does not appear on the rate-book. Thomas, however, is the person jointly interested with William, and not merely a stranger; and as the rate is a charge affecting the joint occupation, the payment may be considered as made in respect of the interest really charged, and the person in actual occupation.

CROMPTON, J. Upon the facts stated, I think there was evidence to show that William was the person rated, and I cannot say that I feel any doubt upon the other question. I think there was a payment by both. The father acting for himself, and as agent for his son in

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respect of their joint tenancy and joint occupation. The privity existing between them was quite enough to give him an authority, and there is a *bonâ fide* payment of rent and taxes by him.

Order confirmed.

REGINA v. THE INHABITANTS OF THE COUNTY OF SOUTHAMPTON (BLACK BRIDGE). THE SAME v. THE SAME (SANDOWN BRIDGE). THE SAME v. THE SAME (TINKER'S BRIDGE).

June 18, 1852.

Bridge — Isle of Wight — Liability to repair — Statute — Construction of — 43 Geo. 3, c. 49 — Rebuilding by Justices — Foot-bridge.

The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the Isle of Wight not repairable by tenure were repaired either by the tithings in which they were situate, or by rates in the nature of county rates, levied on all the parishes in the island, under the following arrangement. The Isle of Wight, having been assessed to the general county rate, and appeals against such assessment having been made, in 1774 an arrangement was made, by an order of Quarter Sessions, and, by consent, fixing certain proportions to be paid by the parishes in the Isle of Wight towards the general county rate, but leaving the expense of bridges and houses of correction to be raised by a local rate; "the said island being adjudged and declared not to be liable to pay to the county bridge rate, or to the house of correction; the Isle of Wight agreeing to erect and maintain houses of correction and bridges within the island at its own expense." Accordingly, from 1774, the practice was for the Quarter Sessions of the county, on the application of the justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the bridges and bridewell in the island, and this local rate, and not the general county rate, was always expended in such repairs. In 1813, a local act of parliament passed, by which commissioners were appointed for managing the roads and highways in the island, and which enacted that all bridges, &c., which had, previous to the passing of the act, been repaired by any tithings, &c., should for the future be repaired in the same manner and by such ways and means as other bridges, usually called county bridges, within the island, had been accustomed to be repaired: —

Held, that all bridges which, at the time when the local act passed, were repairable by the tithings, were thenceforward repairable by the county generally; and that the conventional mode of assessing the island alone to a rate for the repairs of its bridges and bridewell, under the arrangement of 1774, could not affect the legal liability of the county, or be any answer to an indictment against it for non-repair of such bridges.

A bridge in the Isle of Wight was, after the passing of the above local act, wholly rebuilt by order of the justices for the island division, out of the island rate before mentioned. The construction of the new bridge was materially different from, and it stood higher up the stream than, the former bridge. None of the forms required by the 43 Geo. 3, c. 49, were observed in building the new bridge: —

Held, that the county remained liable to repair the new bridge.

A foot-bridge, formed by three planks, about nine or ten feet long, and a hand-rail, which carries a public footpath over a small stream, is not such a bridge as the county is bound to repair.

THESE were indictments for the non-repair of certain public bridges in the Isle of Wight, in the county of Southampton. The county pleaded not guilty.

The indictments were tried, by consent, at the Somersetshire summer assizes, 1851, when it was admitted that the bridges in question were out of repair, and verdicts of guilty were taken, subject to the opinion of the court upon the following statements of facts agreed upon by the parties; the questions for the opinion of the court in each of the cases being, whether the inhabitants of the county of Southampton were now liable to repair the bridges respectively specified in the indictments. If they were, the verdicts were to stand. If they were not, those verdicts were to be set aside and verdicts of not guilty entered.

CASE OF BLACK BRIDGE.

The bridge mentioned in this indictment is a stone bridge, used by the public, and erected in the year 1840, under the circumstances hereinafter mentioned, in the place of an ancient public bridge of wood and stone, which always, before and at the passing of the local act, 53 Geo. 3, c. 92, hereinafter mentioned, had been used to be repaired by the tithing of Knighton, in the parish of Arreton, in the Isle of Wight. Before 1842, all the public bridges in the Isle of Wight, not repairable by tenure, had been maintained and repaired either by the inhabitants of certain tithings, parishes, and places in which they were situate, or by rates in the nature of county rates, levied on the inhabitants of all the parishes and places in the island under the arrangement hereinafter mentioned. From 1774 until 1842, the practice was, for the justices of the Isle of Wight division to apply to the Quarter Sessions of the county of Hants, for "a rate in the nature of a county rate," and thereupon an order of sessions and rate was made in every parish in the island, purporting to be "for repair of the bridges and bridewell in the island, and for other purposes, to which such rate was by law applicable within the island." Before 1774, entries in the order-books and books of assessment of the general county rates show that rates were at various times made on the several places and parishes in the Isle of Wight, but the sums levied thereon were not uniform.

[The case then set out all the entries, down to 1774, found in the existing county records which related to the practice before that year, with the amount appearing to have been levied.]

These contributions were parts of the general county rates, and applied indiscriminately with the contributions of the mainland. No instance is known before 1842 of the application of the general county rate to the repair of an island bridge; but the county justices of the Isle of Wight division were used to expend the island rate in the nature of a county rate made in the manner above specified, on the objects for which it had been directed to be applied by the county Quarter Sessions, *i. e.*, "island bridges and bridewell;" and this was the usage and practice when the local act above referred to passed. Until very recently there has always been a house of correction, or bridewell, for the Isle of Wight, in Newport. There is not nor never was a commission of the peace for the island, which is a division of the county of Southampton.

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In 1772, the Isle of Wight having been assessed to the general county rate in common with the other parts of the county, appeals against such assessment were entered, which were continued to 1774, when an arrangement was made, by consent, at the General Quarter Sessions, fixing certain proportions to be paid by the parishes in the Isle of Wight towards the general county rate, but leaving other items of expenditure, namely, bridges and house of correction, to be raised by a local rate; the terms of the order of Sessions being, "the said island hereby being adjudged and declared not to be liable or subject to pay to the county bridge rate or to the house of correction; the Isle of Wight agreeing to erect and maintain, from time to time, houses of correction and bridges within the said island at their own and sole expense."

[This order of sessions was set out, by which it was ordered "that whenever a rate of 3*d.* in the pound shall be made on the county at large, the proportion to be paid by the Isle of Wight to such rate shall be 270*l.*; and that the like proportions shall be observed in assessing the said island, be the general rate upon the county more or less than 3*d.* in the pound, deducting, however, out of such proportion such sum or sums of money as the Isle of Wight ought to have paid to the bridges and houses of correction had they been liable thereto."]

The magistrates acting for the division of the Isle of Wight, did, by and out of the local rate, levied exclusively on parishes in the Isle of Wight, by order of Sessions, and made in the form above stated, from time to time, repair such public bridges in the Isle of Wight as were of the nature of county bridges; and, so far as regards the general county rate, the proportions settled by the order of sessions in 1774, and subsequently in 1819, were alone contributed by the Isle of Wight down to 1842. There never was any indictment against the county for not repairing bridges in the Isle of Wight previously to 1842, nor any indictment against the inhabitants of the Isle for such non-repair.

In 1813, a local act, 53 Geo. 3, c. 92, (local and personal, public), was passed for consolidating the management of all roads and highways in the Isle of Wight, and appointing commissioners for that purpose.¹

¹ The following clauses of the act were stated in the case.

Section 67. And be it further enacted, that all bridges, drains, and sewers within the said parishes and places aforesaid, which have, previous to the passing of this act, been accustomed to be repaired by any parishes, tithings, divisions, or townships, shall, from and after the 11th day of October, 1813, be forever repaired and kept in repair in such and the same ways and means as other bridges, drains, and sewers, usually called county bridges, within the said island, have been and are accustomed to be repaired. And that from and after the said 11th day of October such particular parishes, tithings, divisions, and townships shall be discharged from the exclusive burthen of keeping and maintaining such bridges, drains, and sewers in repair.

Section 81. Enables the commissioners under that act to build, erect, repair, and keep in repair, any bridge or bridges on any part of the roads in the island, and across any river, stream, ditches, or drains therein or contiguous thereto, making recompense to the owners and occupiers of lands for damage done to them.

In 1838, 1839, and 1840, the justices of the Isle of Wight division repaired Black Bridge out of the island rate so made, by order of the Quarter Sessions as aforesaid. In 1840, it was wholly rebuilt by them out of the island rate, with stone with one arch. The old bridge was narrowed by three or four feet, and consisted of stone walls at each end, with oak timber trees placed from one wall to the other across the stream. Across the trees were planks, upon which gravel was placed, and the road over the bridge formed. This old bridge was repaired about forty years ago, just before the passing of the local act, when new timbers and planks were substituted in place of the old ones, which were decayed; but the walls were not then disturbed. This work was done at the expense of the tithing of Knighton. The side fences to the bridge then consisted of posts and rails; the wall portion at each end was left standing until the rebuilding in 1840. The justices of the island built this new bridge in 1840, without observing any of the forms required by the 43 Geo. 3, c. 49.

In 1842, the county again proposed to assess the Isle of Wight in common with the rest of the county, according to a fresh valuation made under the 55 Geo. 3, c. 51, and the 56 Geo. 3, c. 49, and without reference to the old proportions; and, in consequence of the opinions of counsel then given, such assessment was made and has since continued, and has been, from time to time, paid, and the Isle of Wight has ever since been included in the general assessment, and no separate island rate has been made at the Quarter Sessions; but applications have been made, from time to time, to the justices at the General Quarter Sessions at Winchester, to repair bridges and bridge-wells in the Isle of Wight, when the repairs became necessary.

In January, 1847, Black Bridge was repaired by the county magistrates, when the sum expended was 2*l.* 15*s.*; and a like repair has been once made by the same magistrates, but on this last occasion without prejudice to the question of liability. The commissioners of highways, under the above-mentioned local act, have repaired the road over the bridge, and for 100 yards on either side thereof, since the passing of the local act down to 1842.

Crowder, in support of the prosecution.¹ It is clear that an indictment would lie against the county for the repair of what is properly a county bridge in the Isle of Wight. As, therefore, there is this primary liability, the county is bound to plead and prove some other particular liability, in order to shift the burthen. There is no such plea on this record.

[*LORD CAMPBELL*, C. J. It is difficult to say that the local act casts on the county the common law liability to repair island bridges: it imposes upon it the customary island liability.]

The arrangement made in 1774 does not cast any separate liability on the island, but the island repaired for the county. Secondly, it is

¹ May 1, before *LORD CAMPBELL*, C. J., *WIGHTMAN*, J., *ERLE*, J., and *CROMPTON*, J.

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said that this is not the same bridge as was formerly repaired out of the island rate, as it has been rebuilt in the manner stated in the case, and not under the direction of the county surveyor. But *The King v. Devon*, 5 B. & Ad. 383; s. c. 2 Law J. Rep. (N. S.) M. C. 74, is directly against this objection.

Kinglake, Serg., for the defendants. First, the county never was liable to repair Black Bridge. The case finds that there were, before 1813, three modes of repairing bridges in the Isle of Wight. 1. *Ratione tenuræ*; 2. By the tithings under their customary liability; 3. By rates, in the nature of county rates levied on the whole island under the arrangement of 1774. Then the 53 Geo. 3, c. 92, has no special reference to bridges. Its object was to consolidate the management of the highways; and section 67 relates to drains and sewers as well as to bridges. It is clear, therefore, that it has reference to some peculiar island liability, and not to the common law liability of the county to repair bridges.

[WIGHTMAN, J. If this had been an old county bridge, who would have been liable?]

Not the county. Probably the island would be liable as being in the nature of a division under the 22 Hen. 8. The county has never imposed a general rate for the repair of island bridges. From 1774 to 1842, a rate for the repair of bridges and bridewell was laid on the island alone upon the special application of the island justices.

[LORD CAMPBELL, C. J. It was laid by the justices of the county at large.]

It was necessary by the 12 Geo. 2, c. 29, to have one general rate. Secondly, supposing that the county was ever liable, then the 43 Geo. 3, applies, and prevents that liability extending to the bridge when rebuilt. It is plain that this is a different bridge substituted for that which formerly existed. If the alteration were merely for repair, no doubt it would not affect the liability, but it is otherwise where it is for the purpose of substitution.

Crowder replied.

Cur. adv. vult.

CASE OF SANDOWN BRIDGE.

This case, in addition to the same general statement relating to the liability of the county to repair island bridges as in the preceding case, contained the following facts applicable to the bridge in question.

The bridge mentioned in the indictment is a stone and brick bridge used by the public, and erected since the year 1813, under the circumstances hereinafter mentioned, instead of an ancient public bridge of stone, called by the same name, situate in the tithing of Sandown, in the parish of Brading, across the same stream of water, which bridge, always before and at the passing of the local act, 53 Geo. 3, c. 92, before mentioned, had been used to be repaired by the tithing of Sandown aforesaid.

The present bridge was built in the year 1814, since the passing of the said local act. The old one was of stone and of narrow dimensions, sufficient only for one carriage or wagon to pass at a time, and stood in a different position, rather lower down the stream. This bridge had two arches, and was generally used for carriages only when there was a great depth of water. At other times, carriages used to pass through the stream. This bridge being out of repair, the justices for the island division caused the present new bridge to be built of stone and brick of greater width than the old one, and sufficient to enable two carriages to pass each other. It consists of one arch only, and the road has been raised at each end, so that all carriages now regularly pass over it at all times. The expense of the new bridge was defrayed out of a local rate ordered by the Quarter Sessions of the county, in the manner described in the former case, and levied on the inhabitants of the islands. In the erection of the bridge, the justices of the island division employed a local surveyor, but did not comply with any of the directions of the 43 Geo. 3, c. 59. Before 1842, the new bridge was usually repaired by order of the justices of the island division, from the local rate rate ordered and levied as aforesaid. In 1849, it was repaired by order of the Quarter Sessions, but without prejudice to the question of liability. The commissioners of highways under the above named local act have always repaired the road over the bridge, and one hundred yards at each end, down to the year 1842.

Crowder, for the prosecution. Besides the general question before argued, it is also objected that this is a new bridge built higher up the stream, and since the 43 Geo. 3, c. 59, and without observing the requirements of that statute. But it was erected by the justices for the island division of the county, acting on behalf of the county at large, and the expense was defrayed out of the island rate. It is plain, therefore, that section 5 of the act does not apply, as it has not been built "by or at the expense of any individual or private person." Where a bridge is ordered to be rebuilt by the Quarter Sessions of a county, the 53 Geo. 3, c. 59, s. 5, does not apply.

Kinglake, Serg., contra. Justices out of Quarter Sessions have no authority to order a county bridge to be rebuilt. If they do so, they act as mere private individuals, and the 53 Geo. 3, c. 59, s. 5, will apply.

[ERLE, J. Surely the Quarter Sessions may appoint a committee to repair the bridges.]

No such fact is found by this case. In *The King v. Derby*, 3 B. & Ad. 147; s. c. 1 Law J. Rep. (N. S.) M. C. 15, trustees under a turnpike act were held to be private persons within the meaning of that section. *The King v. The West Riding of Yorkshire*, 5 Burr. 2594, is very closely in point. There the bridge was put lower down the

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stream, and the county was held not liable. *The Queen v. Adderbury East*, 5 Q. B. Rep. 187; s. c. 13 Law J. Rep. (N. S.) M. C. 9.

Crowder replied.

Cur. adv. vult.

CASE OF TINKER'S BRIDGE.

This case also contained the same general statement of facts as the two others, with the addition of the following description of the particular bridge in question.

Tinker's Bridge is an ancient foot-bridge, in the parish of Shorwell, in the Isle of Wight, formed by three planks and a hand-rail, over a small stream, running through fields. It now consists of three oak planks about nine or ten feet long, and carries a public foot-path over the stream. The stream is about one and a half feet deep in summer, but frequently deeper in winter. Before and at the passing of the local act before-mentioned, it was always repaired by the said parish of Shorwell, in which it is situate. Since the passing of that act, it has usually been repaired by the road commissioners under that act.

Crowder, for the prosecution. A point is raised in this case as to the structure of the bridge, which it is said is not such as to make it a county bridge. There appears to be no doubt that a foot-bridge may fall within that class. That was assumed in *The King v. Middlesex*, 3 B. & Ad. 201; s. c. 1 Law J. Rep. (N. S.) M. C. 16.

[LORD CAMPBELL, C. J. It can hardly be said that every structure which enables a passenger to cross a running stream is a county bridge.]

The court cannot say judicially that this is not so; and as it has been repaired by the commissioners under the local act, it will be presumed that it is so.

[LORD CAMPBELL, C. J. If I drew any conclusion from that, it would be that it is part of the highway.]

It is not alleged to be part of the highway, but it is called a "foot-bridge."

Kinglake, Serg., contra. It is a question of fact whether this is a bridge or merely part of the highway. This is not like the case of a foot-bridge by the side of a ford or way for carriages, as in *The King v. Middlesex*, but it is a mere mode of continuing the footpath over the stream.

Crowder replied.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

¹ LORD CAMPBELL, C. J., WIGHTMAN, J., ERLE, J., and CROMPTON, J.

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LORD CAMPBELL, C. J. In this case an indictment was preferred against the inhabitants of the county of Southampton for non-repair of a public bridge, called Black Bridge, situate in the queen's highway, in the Isle of Wight; and the question for our consideration is, whether the county of Southampton was liable to repair this bridge, or, indeed, any bridge in the island, or whether the inhabitants of the island were exclusively bound to the repair of this and other public bridges within the island. The Isle of Wight is within, and a division of, the county of Southampton. There is no separate commission of the peace for the island, and *prima facie* the county generally would be liable to the repair of the public bridges within it. It appears, however, that before the passing of 53 Geo. 3, c. 92, all the public bridges in the island not repairable by tenure were repaired either by the inhabitants of certain tithings, parishes and places in which they were situate, or by rates, in the nature of county rates, levied on the inhabitants of all the parishes and places in the island. The island was always assessed to the county rate; but before 1842, the public bridges in the island were never repaired out of the general county rate, but a rate in the nature of a county rate was ordered at the Quarter Sessions of the county to be made in every parish in the island for the repairs of the bridges and bridewell in the island, and for other purposes to which such rate would be applicable by law within the island. In 1774, an arrangement was made at the Quarter Sessions of the county as to the proportions of the county rate to be paid by the island, from which proportion it was agreed that the amount which the island ought to pay for bridges and house of correction should be deducted, the island agreeing to maintain the bridges and house of correction in the island. This agreement, which was merely conventional, was acted upon when the act of 53 Geo. 3, c. 52, was passed. That was an act for amending the roads and highways in the Isle of Wight. By the 67th section, all bridges within the parishes and places specified in the act (the bridge in question being in one of them), which had previous to the passing of the act been accustomed to be repaired by any parishes, tithings, divisions, or townships within the island, were to be repaired, after the 11th of October then next, in the same manner and by such ways and means as other bridges, usually called county bridges, within the island had been accustomed to be repaired. The bridge in question had always been, before the passing of the act, repaired by the tithing of Knighton, in the parish of Arretton. The future repairs of the bridge, being, by the 67th section of the act, declared to be by the same means and in the same manner as other county bridges in the island, we are of opinion that the county generally is liable to the repairs, and that there is nothing in the statute, nor is there any legal ground, upon which the county can claim to be exempt. The statute has taken away the liability of the tithing of Knighton, which had previously always repaired the bridge, and has made it repairable by such ways and means as other county bridges in the island. The county bridges in the island were repaired out of a rate, in the nature of a county rate, made at the Quarter Sessions of the county, upon the parishes

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in the island. Such a rate, however, could only be conventional, and the sessions would have no authority to make such a rate in the nature of a county rate, upon the parishes in the island; nor would this conventional mode of dividing the performance of the legal obligation alter the right of the public, when the liability to the performance became a legal question. No indictment could be maintained against the inhabitants of the island, which, though forming a division of the county of Southampton, is not a district chargeable as such with any liability known to the law, and the statute has expressly removed the obligation from the parishes, tithings, &c., which had formerly repaired them. The county cannot be discharged of the general legal liability thrown upon it, to repair the public bridges within it, except by showing that some other person or persons may be charged. As the county of Southampton has failed in establishing such legal liability in others, we are of opinion that there should, in this case, be judgment for the crown.

There were two other cases against the county for non-repair of two other bridges in the island, Sandown Bridge and Tinker's Bridge. The case of Sandown Bridge turned upon the same question as that upon which we have just expressed our opinion; some minor points were made in it, which were in effect disposed of during the argument, and our judgment, therefore, in this case as well as in that of Black Bridge will be for the crown.

In the case of Tinker's Bridge we were of opinion at the time of the argument, and are still, upon the facts stated in this case with reference to that bridge, that it was not such a bridge as the county would be bound to repair as a county bridge, and, in that case our judgment is for the defendants.

Judgment for the crown in the first two, and for the defendants in the last indictment.

REGINA v. THE INHABITANTS OF DENTON.¹

June 9, 1852.

Indictment on a repealed statute — Arrest of Judgment — Repeal after Proceedings commenced.

After a statute has been repealed it cannot be acted upon in respect of a proceeding under it, commenced before its repeal, and in this respect there is no valid distinction between matters of form and substance. Where, therefore, between the finding of an indictment for non-repair of a road and plea pleaded, the statute upon which alone the indictment could be supported, was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the court arrested the judgment.

THIS was an indictment for the non-repair of a highway. The

¹ 21 Law J. Rep. (N. S.) M. C. 207.

indictment contained four counts; the first two were framed upon the common law liability to repair, and the third and fourth upon the 4th section of 59 Geo. 4, c. 22,¹ intituled "An act for providing that the several highways within the parish of Manchester, in the county palatine of Lancaster, shall be repaired by the inhabitants of the respective townships within which the same are situate." The third count alleged that there hath been, and still is, in the township of Denton, in the parish of Manchester, in the county of Lancaster, a certain common and public queen's highway, to wit, the Stockport and Ashton turnpike road, leading, &c., used by and for all the liege subjects, &c., with their horses, coaches, carts, and carriages, to go, return, &c., and that a certain part thereof, situate in Denton aforesaid (describing it particularly), on the said day, &c., and thence continually afterwards, until the taking of this inquisition at the township of Denton aforesaid, was, and yet is, very ruinous, &c., for want of due reparation and amendment of the same, so that the liege subjects, &c., in, through, by, and over the said last-mentioned part of the said queen's highway, from the said day hitherto, could not, nor yet can, go, return, pass, ride and labor as they were wont and ought to do, &c. That the said highway is not a highway in respect whereof certain proceedings mentioned in the 59 Geo. 3, c. 22, or any of the said proceedings, have been had, or in respect whereof certain verdicts in the said acts of parliament mentioned, or any of them, have been given, or in respect whereof any verdict had, before the passing of the said act of parliament, been obtained against the inhabitants of the parish of Manchester, aforesaid, at large. That the inhabitants of the township of Denton, aforesaid, ought to repair and amend the said part of the said highway, so being in decay, when and so often as it shall be necessary. The fourth count was the same, except that it did not contain the negative averment in respect of the proceedings mentioned in the 59 Geo. 3, c. 22.

Between the time of the finding of the indictment and plea pleaded, the 59 Geo. 3, c. 22 was repealed by the 14 & 15 Vict. c. 10, intituled "An act for relief to the several townships in the parish of Manchester from the repair of highways not situate within such townships respectively," and the latter act did not reenact the provision contained in the 4th section of the repealed act.

The indictment was tried, at the last Liverpool spring assizes, before Cresswell, J. No evidence was given in support of the common law counts, and a verdict was found for the crown on the third count. In the following term, a rule *nisi* was obtained for a new trial,² and also to arrest the judgment, against which

¹ Section 4. "That in any indictment, &c., against the inhabitants of any of the said townships for not repairing any highway within such township, it shall be sufficient to allege generally that the inhabitants of such township ought to repair and amend such highway without setting forth any custom or prescription for that purpose, or referring to the authority of this act."

² It was proved at the trial that the road had been repaired by the neighboring township of Haughton for forty or fifty years, and the jury found that the road was within the township of Denton, that being the only question submitted to them. The

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Atherton and *J. A. Russell* showed cause. As to the objection in arrest of judgment, no doubt the repealed act must be relied upon, but the court will take notice that the subject-matter of the liability upon the third count still remains the same; and the question is, will the change in form by the repealing statute make any difference? If, by legislative interference, such a substantial change is made as to alter the essentials of the offence, the pending proceeding cannot go on; but not so where there is a change in form merely. This distinction seems supported by *The Queen v. The Inhabitants of Marogan*, 8 Ad. & E. 496; s. c. 7 Law J. Rep. (n. s.) M. C. 98, in which case there was a difference in substance, made by the repealing statute. Here, there is only a difference as regards the form of words in which the accusation is couched, and the proceeding by indictment is a common law proceeding.

[COLERIDGE, J., referred to *Surtees v. Ellison*, 9 B. & C. 750; s. c. 7 Law J. Rep. K. B. 335, and other cases upon the bankrupt laws.]

The observations of Lord Tenterden in *Surtees v. Ellison* are stronger than the facts of the case required. *Hitchcock v. Way*, 6 Ad. & E. 943; s. c. 6 Law J. Rep. (n. s.) K. B. 215, is an authority to show that new laws made pending proceedings are not to be taken as affecting substantial rights; and to the same effect is *Moon v. Durdan*, 2 Exch. Rep. 22.

[LORD CAMPBELL, C. J. This is an instance of a simple repeal of the former act.]

No case has gone so far as it is sought to do here. Whether the repealed or repealing act be looked at, the offence remains the same.

Knowles and *Cowling*, contra, were not heard.

LORD CAMPBELL, C. J. Supposing the verdict to stand for the crown on the third count, we have to consider whether the judgment must be arrested. It is admitted that, but for the repealed statute, the count would be bad, and judgment could not be given upon it. The prosecutor calls upon us to pronounce judgment, and the defendant, on the other hand, contends that we ought not to do so, but to arrest the judgment; and the question is, whether we are at liberty to give judgment upon these counts. The general rule is, that a repealed statute cannot be acted upon after it is repealed, but that with regard to all matters that have taken place under it before its repeal, they remain valid, and cannot be questioned. This principle was

ground for a new trial was, that the evidence of the repair of the road by the township of Haughton negatived the liability of the township of Denton; it being contended that such evidence made out the liability of Haughton to repair the road. On the other hand, it was contended that, without further evidence to show a consideration for the repairs done, the liability of the township of Haughton was not made out. 2 Wms. Saund. 158, b, note O. That a consideration was not to be presumed from the mere fact of repairs. Upon this point the court came to no decision, but intimated that the existence of consideration was not a necessary presumption from the evidence of repairs having been done, but that it was evidence from which a jury might infer a consideration.

acted upon in *The King v. Mawgan*, a case which cannot be distinguished from the present. It is said, that there is a difference between the case where the repealing act affects the substance of the proceeding, and where it affects only the form, but I do not think that any such distinction can be made. The effect of the repealing act must be the same whatever be its nature. The offence was the same in *The King v. Mawgan*, the only difference made by the repealing act being in the mode of procedure. As the law now stands, therefore, the count is bad and must be so treated, and the judgment arrested. We are not giving to the act any retrospective operation, but only from the time of its passing.

COLERIDGE, J. I quite agree. We have one authority on the point; but if the question were *res integra* I think we must have come to the same conclusion. At common law the count is bad, and the act which rendered it good has been wholly repealed. Then the question is, whether the fact of the proceeding, being in course of process, can make any difference; I think not. What has been perfected is not to be disturbed, but if we require the act for any further step it must be in force at the time. This is expressed by Lord Tenterden in *Surtees v. Ellison*. He says, "It has long been established, that when an act of parliament is repealed it must be considered, except as to transactions past and closed, as if it had never existed." That is the correct rule of law on the subject, and, applied to the facts of this case as it was in *Surtees v. Ellison*, is quite conclusive here. *The King v. M Kenzie*, Russ. & R. 429, is to the same effect.

ERLE, J. It is quite clear that the judgment ought to be arrested. The rule of law is, that the repealed statute, as regards further proceedings afterwards, is to be treated as if it had never existed. This is an indictment in respect of a duty created by the 59 Geo. 3, c. 22, and in the form given by that act, and between the finding of the indictment and the time of pleading that act is repealed. Now, to ask us to act after that, and to give further operation to this proceeding, is seeking to contravene the meaning of the word "repeal," according to the force given to it by the above rule. As to what has been said about the difference between form and substance, I think that argument, in point of fact, fails, because the liability here is founded upon the very words of the act, and that, both in substance and form, the count is bad in arrest of judgment.

CROMPTON, J. I am of the same opinion. The objection here is stronger than it was in the case of *The King v. Mawgan*. There, the objection related more to a matter of form of procedure than in this case.

Rule absolute to arrest the judgment.

Regina v. The Trustees of the Birkenhead Docks.

REGINA, on the prosecution of THE OVERSEERS OF THE TOWNSHIP OF BIRKENHEAD, v. THE TRUSTEES OF THE BIRKENHEAD DOCKS.¹

June 3, 1852.

Poor Rate, Liability to — Birkenhead Docks Trustees — Public Purposes.

It is not of itself a ground for exemption from poor-rates, that the occupiers of land are trustees incorporated under acts of parliament for public purposes. It must appear from the provisions of the acts to have been the intention of the legislature that the funds derivable from their occupation should not be applied to the payment of poor-rates.

The trustees of the Birkenhead Docks were empowered by the acts incorporating them, and providing for the construction of the docks, &c., to borrow a certain sum on credit of the rates and tolls granted by the said acts, and of any property thereby vested in them, and, if necessary, to mortgage the same. The maximum tolls and dues to be demanded and received by the trustees were stated in the acts, but the trustees were at liberty to fix and determine the tolls to be taken, provided they did not exceed the amount stated in the act, and from time to time to reduce or alter, and again to raise such tolls. The acts further provided that all sums received from the rates and tolls, and all sums arising from the sale of any lands or the rents thereof, should be applied by the trustees in keeping in repair and maintaining the docks and other works made under the authority of the acts, and of paying officers and servants, and otherwise carrying the acts into execution, and also to the payment of interest and repaying the principal borrowed, under such regulations and conditions as the trustees might, from time to time, think reasonable: —

Held, assuming all the purposes to which the trustees were directed to apply the sums received by them to be public purposes, that as there was nothing in the acts to show that the trustees might not lawfully raise from the rates and tolls a sum sufficient to meet such purposes and pay poor-rates and other charges, that they were liable to be rated to the poor-rate in respect of buildings upon the land vested by the acts in the trustees.

This was an appeal against a rate, made on the 28th of April, 1851, for the relief of the poor, in which the trustees of the Birkenhead Docks were rated in the sum of 500*l.*, the ratable value of certain offices, workshops, and premises in the township of Birkenhead, in the county of Chester. After notice of appeal had been given, and by consent of the parties, the following case was stated for the opinion of this court, under the 12 & 13 Vict. c. 45.

The township of Birkenhead, in the county of Chester, was placed under the management of public commissioners, by act of parliament, 3 & 4 Will. 4, c. 68. In the year 1844, an act (the 7 & 8 Vict. c. 69) was passed, intituled, "An act for constructing tidal basins, a dock, and other works at Birkenhead, in the county of Chester, and for other purposes." And it was thereby enacted, that the commissioners constituted under the act of the 3 & 4 Will. 4, c. 68, should be the commissioners for carrying that act into execution, and should be called "The Commissioners of the Birkenhead Docks," and should have authority to borrow on the credit of the rates and tolls by that act granted, and of any property vested in the said commissioners by virtue of that act, a sum not exceeding 400,000*l.*, and, as a security, the commissioners might assign over the said rates, tolls, and property, or any part thereof, to the person advancing or lending the

¹ 21 Law J. Rep. (N. S.) M. C. 209.

same, by way of mortgage, in the manner and form therein directed and provided, and subject and according to the provisions and the true intent and meaning of the act in that behalf.

By an act of the 8 & 9 Vict. c. 4, additional powers were given to the commissioners, enabling them to borrow a further sum of money, not exceeding 600,000*l.*, on mortgage as aforesaid, and to make a floating dock within Wallasey Pool.

By two other acts, the 10 & 11 Vict. cc. 264, 265, additional powers were conferred upon the commissioners in reference to the Birkenhead Docks.

By another act, the 11 & 12 Vict. c. 144, intituled, "An act to alter and amend the several acts relating to the Birkenhead Docks, and to transfer the several powers of the said commissioners to a corporate body, to be intituled 'The Trustees of the Birkenhead Docks,' and for other purposes," the several rights, duties, powers, authorities, privileges, and immunities conferred upon the said commissioners by the former acts, for carrying into execution the several purposes and provisions of the said former acts, and that act, were vested in certain persons, thereby incorporated by the name of "The Trustees of the Birkenhead Docks."

In pursuance of the powers given to them by the said acts of parliament, the said commissioners and trustees did, accordingly, borrow money upon mortgage, and erected and built two docks, called the Morpeth Dock and the Egerton Dock, which are now completed and used by shipping frequenting or arriving in the river Mersey, and they are now in progress of erecting a great float and other outer works, which are not completed. Among other works erected on the land, vested by the said acts in the said trustees, and completed, are certain offices, workshops, and premises, erected and built by the said commissioners and trustees on land so vested in them, which is in the township of Birkenhead, in the county of Chester; which offices, workshops, and premises are now, and were, at the time of the making of the poor-rate hereinafter mentioned, and now in question, in the actual and exclusive occupation of the said trustees, under the authorities and for the purposes of the said acts of parliament solely; and the said offices, workshops, and premises are hereby admitted, for the purposes of this case, to be of the annual value of 550*l.*, and, if ratable to the poor, to be of the ratable value of 500*l.*

The appellants object that the said offices, workshops, and premises, are not liable to be rated for the relief of the poor, because they say that they have no other right, title, or interest in the said offices, workshops and premises, except as such trustees of the said Birkenhead Docks, under and by virtue of the provisions of the said several acts of parliament hereinbefore mentioned, and that they occupy the said offices, workshops, and premises, as such trustees solely for the purpose of carrying into execution the works, and doing the business which they are authorized and appointed to execute and do, according to the provisions of such acts as such trustees, as aforesaid; and that they, the appellants, do not, nor does any other person, derive any personal benefit whatever from such occupation. That by

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virtue of the said acts of parliament, they, as trustees as aforesaid, are authorized to borrow certain sums of money and receive certain rates, which sums of money and which rates are by the said acts applicable solely to the public purposes therein specified. That they, as such trustees, manage the dock estate by their servants and agents, who receive and account to them for all such sums of money and rates so borrowed and received as aforesaid. That all moneys and funds whatsoever collected, received, levied, borrowed, and raised, by virtue of the said several acts, are and have been, by the said trustees, applied in the same manner and for the purposes directed by and specified in the said several acts, in accordance with the provisions thereof, and for no other purpose and in no other manner whatever. That they, as trustees as aforesaid, derive under the said acts no private advantage from the execution of their trust, and that there is no surplus or profit accruing to the said appellants from the said estate as such trustees, after the application by them of the moneys arising from such estate in the manner directed by the said several acts of parliament hereinbefore mentioned.¹

¹ The 39th section of 7 & 8 Vict. c. 79, enacts, "That it shall be lawful for the commissioners, from time to time, to borrow at interest, on the credit of the several rates and tolls by this act granted, and of any property which may be vested in the commissioners by virtue of this act, any sum of money which shall not exceed the sum of 400,000*l.*, and in the event of any part of such sum of money being repaid by the commissioners, to reborrow the same, and so *toties quoties*, but so, nevertheless, that there shall not be owing on the security aforesaid, any more than the sum of 400,000*l.*, in the whole, at any one time, and for securing the repayment of the moneys so borrowed with interest, the commissioners, or any five of them, may assign over the said rates, tolls, and property, or any part thereof, to the person who shall advance or lend such money, or his trustee, as a security for the payment of the money so to be borrowed, together with interest for the same."

Section 153. "That it shall be lawful for the commissioners to demand and receive for every vessel which shall enter any of the basins or docks, to be constructed under the authority of this act, any sum not exceeding the several rates following, (that is to say), 'For every vessel to or from any port or place within the United Kingdom of Great Britain and Ireland, the sum of 6*d.* for each ton thereof; for every vessel to or from any port or place the sum of 1*s.* 6*d.* for each ton thereof; for every vessel which shall remain in any of the said basins or docks for any longer period than six months, a further sum equal to half of the rates which shall have been paid in respect of such vessel, and so on for every further period of six months.'"

Section 225. "That it shall be lawful for the commissioners to fix and determine the tolls to be taken by virtue of this act, but so, nevertheless, as not to exceed the respective sums hereinbefore authorized to be received; and it shall also be lawful for the commissioners from time to time to lower, reduce, or alter all or any of the said tolls, and again to raise the same to such amount as they shall think proper, not exceeding the respective sums by this act authorized to be received."

Section 227. "That all sums of money which shall be received by the commissioners from the rates and tolls granted by this act, and all sums arising from the sale of any lands, or the rents thereof, shall be applied by the commissioners in defraying the costs, charges, and expenses of keeping in repair, and, from time to time, deepening, cleansing, improving, and maintaining the sea wall, basins, dock, embankment, roads, cuts, drains, culverts, and other works which may be erected or made under the authority hereof, and of paying the officers and servants employed by the commissioners in, and about, and concerning the same, and of otherwise carrying this act into execution, and for paying the interest and repaying the principal of any sum of money which shall be borrowed by the commissioners under this act, under such regulations and conditions as the commissioners may, from time to time, think reasonable."

If the court should be of opinion upon the said objection that the said offices, workshops, and premises, were not liable to be rated to the relief of the poor, and, therefore, that the said rate should be amended by striking out the said assessment, their judgment, in conformity with the decision of such court, and for such costs as such court shall adjudge, may be entered on motion by the appellants at the Quarter Sessions for the said county, next, or next but one, after such decision shall have been given: but if the court should be of opinion that the said trustees were liable to be rated for the offices, workshops, and premises, in the said rate mentioned, and that the said rate should, therefore, be confirmed, judgment in conformity with the decision of such court, and for such costs as the said court should adjudge, might be entered on motion by the respondents at the Quarter Sessions for the said county, next, or next but one, after such decision should have been given.

Archbold, (May 1), for the respondents. The appellants are properly rated. The objection on the part of the appellants is, that the docks are used for public purposes exclusively, and that the case falls within the decision in *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61; s. c. 5 Law J. Rep. M. C. 145. But that case rests on the ground that there was no individual beneficial occupation. The particular act in that case provided, that the money raised under it should be "applied and disposed of to the building and repairing the said new dock or basin and harbor of Liverpool, and to no other use and purpose whatsoever;" and the last act, which repealed former dock-rate acts and imposes new duties, directed that, after payment of the moneys borrowed, the trustees should "lower and reduce the rates and duties hereby granted and made payable as far as the same can be done in the then state of the docks, basins, buildings, and other works and buildings of the said port, and leaving sufficient for all charges of management and collection of rates on the said docks, &c., and improving, &c., the same, and for carrying into execution the provisions of the former act and this act." Such provisions will not be found in the acts now to be considered by the court, and in this case the trustees are actual owners, and may have a surplus. By the 39th section of the 7 & 8 Vict. c. 79, made for the improvement of Birkenhead, the trustees are empowered to borrow a sum not exceeding 400,000*l.*, and to assign, as a security, the tolls by that act granted.

The 55th section empowers the commissioners of Woods to make free grants of the soil of the shore to the commissioners for executing those acts. The 57th section gives them power to purchase lands for the purposes of the act. The 125th section gives power to construct the works. The 153d section fixes the rates of dues to be taken from vessels. The 225th section gives a power to reduce and again to raise the tolls. The 227th section directs the application of the tolls. It will be said, on the other side, that the 227th section contemplates only three classes of expenditure, to which the produce of the tolls is to be applied: the maintenance of the docks, the payment of officers and servants, and the payment of interest and principal of moneys

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borrowed. That is true; but there are not in the 127th section any negative words, as there were in the acts considered in *The King v. The Inhabitants of Liverpool*, and in *The King v. The Commissioners of Salters-load Sluice*, 4 Term Rep. 730, which case was relied on, by Lord Tenterden, C. J., in *The King v. The Inhabitants of Liverpool*, when he held that a direction to discharge certain burdens, and then to lower the rates, was equivalent to a direction to apply the rates to certain purposes, and no other. The 8 & 9 Vict. c. 4, authorizes the borrowing of 600,000*l.* on mortgage, in the same way as under the former act. Then comes the 11 & 12 Vict. c. 144, which constitutes "The Trustees of the Birkenhead Docks," making them a corporate body, and gives them powers to pay themselves and to carry on the works. The trustees, by the operation of that act, are permitted to have, and, in fact, have, an actual interest in the works as occupiers.

Pashley, for the appellants. These docks are a benefit to the public at large; the purpose for which they exist is a public purpose, and, therefore, the trustees should be exempt. This case is not really distinguishable from *The King v. The Inhabitants of Liverpool*.

[LORD CAMPBELL, C. J. You must make out that this public purpose is one that is to be carried out at the expense of the rate-payers of this particular locality.]

The rate-payers get an equivalent in the benefits conferred by the docks.

[LORD CAMPBELL, C. J. I see no prohibition of a surplus, and no provision as to an application of any surplus. What is to be done with it if there be one?]

It will be a gross violation of the duty of the trustees not to prevent a surplus. *The Queen v. The Mayor of Liverpool*, 9 Ad. & E. 435; s. c. 8 Law J. Rep. (N. S.) M. C. 41, and *The Queen v. Badcock*, 6 Q. B. Rep. 787; s. c. *nom.* *The Queen v. The Trustees of Taunton Market*, 14 Law J. Rep. (N. S.) M. C. 58, show clearly that these trustees ought not to be rated. Sections 225 and 227 in effect prohibit keeping up the rates beyond the sum necessary for the purposes of the acts.

[CROMPTON, J. The earlier of those two cases proceeded on the ground, that, as the docks were in the occupation of the corporation, the profits, if any, must go to the borough fund, and be applicable to public purposes only. The latter case was not decided in conformity with the earlier.]

The purposes of the acts here are clearly public purposes.

Archbold, in reply. The case of *The Queen v. Badcock* is rather a decision against the appellants. In this case there may be a surplus, for there are no negative words to prevent it; and if there be a surplus, there are no words in the acts directing the application of it. He referred to *The Queen v. St. Giles, York*, 3 B. & Ad. 573; s. c. 1 Law J. Rep. (N. S.) M. C. 50.

Cur. adv. vult.

The judgment of the court¹ was now delivered by —

LORD CAMPBELL, C. J. We are of opinion that the rate in question is valid. The appellants are *prima facie* liable to it under the 43 Eliz. c. 2, s. 1, which enacts, that every occupier of land and houses shall be rated to the relief of the poor. They are seised in fee and are actually in possession of the Birkenhead Docks, from which they receive a large revenue. Their exemption from ratability would operate as a great hardship upon the rate-payers within the township. This property, before it was applied to the construction of docks, was ratable and rated to the relief of the poor; and, from its being applied to this great commercial speculation, the number of destitute persons within the township must be considerably increased. Still, we are only to consider what the law upon the subject is; and we are bound to pronounce in favor of the exemption, if it has been conferred by any subsequent statute.

The appellants do not and could not rely upon the mere circumstance of their being trustees, and so not entitled to any personal advantage from the property vested in them. They contend that the dues to which they are entitled are all appropriated to public purposes, and that, therefore, they are exempt from ratability, according to the decision of this court in *The King v. The Inhabitants of Liverpool*. Where no one can be found who may be considered the occupier of lands and houses, the statute of Elizabeth does not extend to them; but where there are occupiers of lands and houses within the meaning of that statute, the exemption must rest on some subsequent enactment of the legislature. We apprehend that this doctrine was admitted and acted upon in the *Salters-load Sluice case*, from the marginal note of which the exemption, on the ground of public purposes, takes its origin. The question argued at the bar, and to be considered as decided, was, whether the legislature, by the local act, intended impliedly to exempt the tolls from ratability, although Lord Kenyon, in delivering the judgment of the court, uses some expressions about there being no occupier, because the commissioners were merely trustees. The decision can be rested only on the clause in the local act, which directed the tolls "to be applied and disposed of for the several uses and purposes of the said act, and to no other use or purpose whatsoever." The question was, whether this amounted to a prohibition to apply the tolls to the payment of poor-rates? The court adopted this construction, instead of holding the meaning of the words to be, that the clear produce of the tolls, after deducting the expenses of collecting them and all the charges to which the property was liable (such as poor-rates), was to be applied to these purposes. We think that the decision in the *Liverpool case* can only be supported by similar reasoning. There the local acts directed that the rates and dues received for the use of the dock should be applied to paying off the debt incurred in making it, and to keeping it in

¹ LORD CAMPBELL, C. J., WIGHTMAN, J., ERLE, J., and CROMPTON, J.
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repair, and that these purposes being effected, the rates should be lowered for the benefit of those using the dock. Lord Tenterden would not adopt the construction of the statutes, that the charges ought to be deducted from the rates before they were so applied, but still he proceeded upon a special statutable exemption, saying, "The statute under which the dock rates in question are levied, does not indeed contain an express direction that the rates shall be applied to the purposes specified and no other; but it directs that certain burdens shall be discharged, and that then the rates shall be lowered, and, therefore, any application of those rates to other purposes not specified, would be a direct violation of the statute."

It follows that, if we recognize this case, we must look to see whether, by the local acts respecting the Birkenhead Docks, the legislature has conferred the exemption claimed. By the 7 & 8 Vict. c. 79, s. 153, the commissioners who occupy the property are empowered to levy certain rates from vessels, and by section 225, to lower, to alter, or again to raise them at their discretion, provided they do not exceed the specified amount. And, by section 226, all sums received from rates or from sale of land, or from the rent thereof, are to be applied to the costs and expenses of keeping the docks in repair, and of paying the officers and servants employed in them by the commissioners, and of otherwise carrying the act into execution, and for paying the interest and repaying the principal of any sum of money which shall be borrowed by the commissioners, under such regulations and conditions as the commissioners may, from time to time, think reasonable.

We are of opinion that these enactments are not sufficient to testify any intention of the legislature to exempt the Birkenhead Docks from liability to contribute to the relief of the poor. Assuming all the purposes enumerated in section 227, to be public purposes (about which there may be considerable difficulty), here the obligation to lower the tolls, so much relied upon in the *Liverpool case*, is entirely wanting. There is nothing amounting to a prohibition against payment of other charges than those specified, and we can find nothing to show that the commissioners may not pay poor-rates along with other charges before the net amount of the fund is ascertained, which may be applied to the purposes of the act. There is no statement, and there has been no suggestion, that the rates at the scale to which they may be lawfully raised, would not, after the payment of this charge, be sufficient for all these purposes. We, therefore, consider that the present case is distinguishable from those relied upon, and that the property of the appellants, not being expressly or impliedly exempted by the legislature, ought to bear its share of the public burdens with other lands and houses in the township.

It is thus unnecessary to examine whether the case of *The King v. Liverpool*, be affected by *The Queen v. Badcock*, *The Queen v. Longwood*, 13 Q. B. Rep. 116; and *The Queen v. Harrogate*, 20 Law J. Rep. (N. S.) M. C. 25, 1 Eng. Rep. 281, or any other subsequent decision. We have now only to give

Judgment for the respondents.

Regina v. Sill.

REGINA v. SILL.¹

June 7, 12, 1852.

Indictment, Removal of, to Central Criminal Court—4 & 5 Will. 4, c. 36, s. 16.—False Pretences—7 & 8 Geo. 4, c. 25, s. 53.

The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 16, provides that the Court of Queen's Bench, or the commissioners under that act, being judges of the superior courts, or the judges of the Court of Bankruptcy, or the recorder of London, may issue writs of *certiorari* or other process to remove into the Central Criminal Court indictments found at the sessions for London, Middlesex, &c., for any offences cognizable by virtue of that act:—

Held, that this does not repeal the 7 & 8 Geo. 4, c. 29, s. 53, which enacts that no indictment for obtaining money, &c., by false pretences, shall be removed by *certiorari* into the Court of Queen's Bench; but that it authorizes the several judges there specified to issue writs, in the nature of writs of *certiorari*, to remove indictments for any offences there cognizable into the Central Criminal Court from the sessions there mentioned.

DOYLE moved in this case, on behalf of the defendant, for a rule nisi for a *certiorari* under the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 16,² to remove an indictment for obtaining money under false pretences, which had been preferred and found at the Middlesex sessions. He referred to *The Queen v. Brier*, 19 Law J. Rep. (N. S.) M. C. 121.

Metcalf showed cause in the first instance. The statute 7 & 8 Geo. 4, c. 29, s. 53, takes away the *certiorari* in the case of an indictment for obtaining money under false pretences, and this is an attempt indirectly to infringe that statute, and to remove the indictment into this court from the Central Criminal Court, which could not be done directly. The express enactment of the 7 & 8 Geo. 4, c. 29, s. 53, taking away the *certiorari*, cannot be considered as repealed by the general words in section 16 of the 4 & 5 Will. 4, c. 36.

Doyle, in support of the rule. The defendant only asks that this indictment may be removed, so as to be tried before the judges of the

¹ 21 Law J. Rep. (N. S.) M. C. 214; 17 Jur. 22.

² This section enacts "That it shall be lawful for his majesty's Court of King's Bench, or any judge thereof, or any commissioner of oyer and terminer, and gaol delivery, under this act, being a judge of any of the superior courts at Westminster, or the chief judge or any other judge of the Court of Bankruptcy, or the recorder for the said city of London for the time being, if such court, judge, or recorder shall think proper, to issue any writ or writs of *certiorari*, or other process, directed to his majesty's justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, or either of them, commanding the said justices of the peace, or any or either of them, to certify and return into the said Court of Oyer and Terminer, and gaol delivery, indictments or presentments found or taken before the said justices of the peace, or any of them, of any offences cognizable by virtue of this act, and the several recognizances, examinations, and depositions relative to such indictments and presentments, so that the same offences may be dealt with, tried, and determined by the said justices and judges of oyer and terminer and gaol delivery," &c.

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superior courts at the Central Criminal Court. The 16th section of the 4 & 5 Will. 4, c. 36, clearly entitles the party to apply for that.

LORD CAMPBELL, C. J. Probably, under that section, what should be asked for is not strictly a *certiorari*, which would remove the indictment here, but a writ in the nature of a *certiorari* to transfer the indictment from the sessions to the Central Criminal Court. As the writ of *certiorari* is expressly taken away by the 7 & 8 Geo. 4, c. 29, we cannot allow it to issue, but we may order the indictment to be transferred to the Central Criminal Court; and this order we make. It is difficult to say absolutely that it cannot be removed further, because we cannot remove it directly into this court; but we should be slow in allowing that to be done indirectly, which we are forbidden to do directly.

COLERIDGE, J. I rather think the 16th section is not to be taken as repealing the 7 & 8 Geo. 4, c. 29, but that it has a special relation to the matters cognizable under it, and merely gives power to issue a special writ to remove the indictment into the Central Criminal Court without bringing it into this court at all. The case of *The Queen v. Brier* is quite a different case from the present.

ERLE, J., concurred.

CROMPTON, J. The ordinary writ of *certiorari* can hardly be meant by the 16th section, as the power to issue the writ or process under it is given to a judge of the Court of Bankruptcy.

*Rule granted accordingly.*¹

¹ On the last day of Trinity term, (June 12),

Metcalf moved to quash the rule which had been thus granted, and to remit the indictment to the Middlesex sessions, unless it were immediately removed under it. He stated that the session of the Central Criminal Court would commence on Monday the 14th of June, and that if the prosecutor was not able to try at that session he would be delayed.

[COLERIDGE, J. When do you propose to have cause shown.]

There is some difficulty as to that; but probably, under the circumstances, the court would permit cause to be shown at chambers.

LORD CAMPBELL, C. J. The application appears to be a very reasonable one; but the writ was only granted five days ago, and there is no such palpable delay as to justify us departing from the ordinary course by directing cause to be shown at chambers. The rule *nisi*, therefore, may be granted, but to show cause next term.

Regina v. The Churchwardens, &c., of Longwood.

REGINA v. THE CHURCHWARDENS, &c., OF THE TOWNSHIP OF
LONGWOOD.¹

June 18, 1852.

*Poor Rate, Liability to — Waterworks — Occupation by Commis-
sioners — Net Value — Principle of Calculation.*

The commissioners of the Huddersfield Waterworks, under two private acts of parliament, were the proprietors of reservoirs, &c. in the township of Longwood, for the supply of water to the town of Huddersfield, and to secure a supply of water to certain mill-owners and occupiers in Longwood. The commissioners were bound by their acts to furnish water gratis in case of fire, to supply it at 1d. per 100 gallons for watering the streets, and to the consumers at certain specified rates so calculated that the water rents were not in any one year, after payment of the expenses, to exceed 7l. 10s. per cent. on the amount which should be owing by the commissioners in respect of the loan which they were empowered to raise on mortgage of the works and water rents, and after the discharge of the whole of the said loan, the water rents were to be reduced so as merely to cover current expenses. The commissioners were rated to the relief of the poor on the sum of 490l., the sessions finding that sum to be the estimated net ratable value of all the reservoirs, pipes, and other apparatus in Longwood, taken in connection with, and as part of the entire works in Longwood and Huddersfield, being made up of 300l., the estimated net annual value of all the reservoirs, and 190l., the net annual value of the pipes and other apparatus in Longwood. The sessions also found that a tenant of the entire waterworks, if released from the restrictions in the acts of parliament, and able to exercise his discretion as to the amount of water rents and rates, might calculate with reasonable certainty, on a gross revenue of 2,000l., and that, after deducting 800l., the fair average of the current annual expenses, and the sum of 1,100l., proved and admitted to be a proper annual deduction for repairs, renovations, and tenant profits, the residue of 1,100l. represented the net ratable value of the entire works; but that if such tenant was to be considered as subject to the restrictions in the acts, he could make no profit at all:—

Held, by COLERIDGE, J., that substantially the consumers, and not the commissioners, as a separate body, were the occupiers and the parties rated, and that the use and enjoyment of the water, and not merely the water rents, constituted the value of the occupation. That the restriction imposed by the acts amounted to no more than an arrangement between the commissioners and consumers as one body, of the terms upon which the benefits of the occupation were to be enjoyed, and could have no bearing on the question of the amount of ratable value as between the consumers and the inhabitants of Longwood. That, therefore, assuming the sum of 490l. to be the proper proportion of the 1,100l., which, according to the above finding of the sessions had been arrived at on a right principle, as the net ratable value of the entire works, the commissioners were properly rated on that amount for the township of Longwood.

Held, by WIGHTMAN, J., and CROMPTON, J., that the principle put in the finding of the sessions of a tenant released from restrictions, and at liberty to charge any rates he pleased, did not furnish the proper criterion for ascertaining the ratable value in this particular case; but as no other ground was shown for altering the ratable value from 490l., that sum must be taken to be as found by the sessions, the proper proportion of ratable value.

ON an appeal, by the commissioners of the Huddersfield Waterworks, against a rate made, on or about the 30th of March, 1850, for the relief of the poor of the township of Longwood, in the West Riding of Yorkshire, in which the said commissioners were rated at the sum of 1,010l., for and in respect of certain reservoirs, banks, pipes, lands, and hereditaments, situate in the said township of Longwood, the sessions held at Pontefract, in the said riding, in April, 1851, allowed the appeal and reduced the rate to 490l., subject to the opinion of this court.

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The said commissioners are occupiers of the above-mentioned lands and hereditaments, upon part of which the said reservoir and pipes are constructed and laid. The commissioners purchased the said lands, and constructed the said reservoirs and pipes under and by virtue of an act of parliament passed in the 7th and 8th years of the reign of George the Fourth, intituled "An act for supplying with water the town and neighborhood of Huddersfield, in the West Riding of the county of York." This act was enlarged by another act, passed in the 8th and 9th years of the reign of her present Majesty, Queen Victoria, intituled "An act to alter, enlarge, and amend an act for supplying with water the town and neighborhood of Huddersfield, in the West Riding of the county of York." After the passing of the 7 & 8 Geo. 4, c. 84, and before the passing of the said act of the 8 & 9 Vict. c. 70, two reservoirs, one for the supply of water to the town of Huddersfield, and the other as a compensation reservoir to prevent injury to certain owners and occupiers of mills in Longwood, were constructed on part of the lands in Longwood, so purchased and occupied by the said commissioners, of the dimensions, in the manner, under the powers and provisions, and subject to the conditions and restrictions contained in the 7 & 8 Geo. 4, c. 84, and which two reservoirs have respectively been used ever since their construction until the passing of the above-mentioned act of the 8 & 9 Vict. c. 70, in the manner and subject to the conditions and restrictions, and in strict conformity with the powers mentioned and contained in the said statute of the 7 & 8 Geo. 4, c. 84. And since the passing of the act, 8 & 9 Vict. c. 70, the commissioners have constructed another reservoir in Longwood, and also occupied the same in manner and subject to the conditions and restrictions, and in strict conformity with the powers mentioned and contained in both the above-mentioned statutes, as far as the same are respectively applicable. The commissioners appointed under the above acts have borrowed, under the powers thereby given to them, money amounting to 20,000*l.*, and have laid down pipes and other conveniences in Longwood for conveying water to the township of Huddersfield, by means of which a constant and ample supply of water has been and is provided under the said acts to the said township of Huddersfield. The commissioners have received the rents, which by their said acts they have been, from time to time, entitled to demand for such supply of water to the said township of Huddersfield; and the commissioners have from time to time applied the rents so received to the purposes of the said acts, and the said water rents have been reduced by the commissioners to one half the amount which was originally charged by them for such supply of water, by authority of the said acts to the said township of Huddersfield. The compensation clauses, which were inserted in the said acts to prevent injury to individual owners and occupiers of mills in Longwood, have been strictly observed and fulfilled by the commissioners, and the compensation reservoir has been made by them as aforesaid for the exclusive use of the said owners and occupiers of mill property in Longwood, and has been used by them accordingly on part of the land, for the occupation

of which the commissioners are now rated, by which the said mill property and the said mill owners have been protected from injury. The said mill owners obtaining water or deriving benefit from the said compensation reservoir do not pay, nor have they ever paid, any rent or consideration in money, or otherwise, to the said commissioners; every thing required to be done, observed, or performed, by the said commissioners by the above acts of parliament, or either of them, either for the reservation of the rights of the inhabitants of Longwood, or other parties mentioned in the said acts, or either of them, or for any other purpose whatever, has been done, observed, and performed by the said commissioners. The works bring no water to Longwood, but they detain water in that township in winter, and the supply of water to Longwood has not been interrupted since the passing of the above acts, or of either of them. The said owners of mill property in Longwood have been benefited by the works made under the said acts. The sessions also found: first, that the above sum of 490*l.* is the estimated net ratable value per annum, of all the reservoirs, pipes, and other apparatus of the company in Longwood, taken in connection and as part of the entire waterworks in Longwood and Huddersfield; and that the amount is made up of the sum of 300*l.*, being the net annual value, which the sessions assigned to the reservoirs, and the sum of 190*l.*, being the net annual value of the pipes and other apparatus in Longwood, as shown by the appellants and found by the sessions. Second, that if the whole works in Longwood ought to be assessed at their intrinsic value in that township, and with reference to the profit that could be derived from them in Longwood alone, without taking into account their connection with the works in Huddersfield, then their net ratable value ought to stand at 150*l.*, and no more. Thirdly, that a yearly tenant of the entire waterworks, if released from the restrictions contained in the commissioners' act of parliament, and able to exercise his discretion as to the amount of water rents and rates, might calculate with reasonable certainty on a gross revenue of 3,000*l.* from the works, and that, after deducting the sum of 800*l.*, which the sessions considered to be the fair average of the current annual expenses allowable under the circumstances, and the sum of 1,100*l.*, which was proved and admitted by the respondents to be a proper annual deduction in respect of repairs, renovations, and tenants' profits, the residue of 1,100*l.* represents the net ratable value per annum of the entire works. Fourthly, that if such yearly tenant is to be considered as subject to the restrictions in the act, he could make no profit at all by his tenancy. Fifthly, that the total outlay of the commissioners in Longwood has been 115-189th parts of the entire outlay in the two townships; that the present actual value of the respective works in the two townships may be assumed for the purposes of this case to be equal; that the area occupied by the reservoirs and the apparatus (consisting of mains and pipes) in Longwood, is twenty-eight acres and a quarter, out of which the reservoirs comprise twenty-seven acres and the apparatus one and a quarter acres, and the area occupied by the like apparatus in Huddersfield is seven acres; that the length of the apparatus of mains and pipes

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in Longwood is to the length of the like in Huddersfield, in the proportion of five to twenty-six; thence it follows, that if the total net annual value be apportioned in the ratio of the outlay, the ratable value of the whole works in Longwood will be 660*l.* and a fraction. If it be apportioned in the ratio of the actual value of the respective works in the two townships, the ratable value of the works in Longwood will be 550*l.*; if it be apportioned in the ratio of the area or acreage occupied by the whole works, the ratable value of the works in Longwood will be 880*l.* and a fraction. Sixthly, if the reservoirs be rated separately at the value specified above, and deducted from the total net value of the entire works as found above, and the residue be apportioned in the ratio either of area or the lengths of the apparatus in the respective townships, then the net ratable value of the whole works in Longwood will, on the first supposition, be 441*l.* and a fraction. If the Court of Queen's Bench should be of opinion that the ratable value of the property and works of the said commissioners in Longwood should be fixed at either of the other sums so found by the sessions as above-mentioned, the said sum of 490*l.* is to be altered to such sum as this court may decide to be such ratable value, and the judgment of the sessions to be altered accordingly. If the Court of Queen's Bench should be of opinion that the sum of 490*l.* is the proper ratable value of the property and works of the said commissioners in Longwood, the judgment of the sessions to stand confirmed.

The case was argued (April 24), by

Pashley and Overend, for the appellants.

Hall and Pickering, for the respondents.

They referred to *The Queen v. The Churchwardens and Overseers of Mile End Old Town*, 10 Q. B. Rep. 208; s. c. 16 Law J. Rep. (N. S.) M. C. 184; *The Queen v. The Churchwardens and Overseers of the Township of Longwood*, 13 Ibid. 116; s. c. 18 Law J. Rep. (N. S.) M. C. 65; *The Queen v. Kentmere*, 21 Law J. Rep. (N. S.) M. C. 13; s. c. 7 Eng. Rep. 435; *The Queen v. The Great Western Railway Company*, 21 Law J. Rep. (N. S.) M. C. 84; s. c. 9 Eng. Rep. 292.

*Cur. adv. vult.*¹

The judgment of the court² was now delivered by —

COLERIDGE, J. In this case, which was argued before my brothers Wightman, Crompton, and myself, the question was upon the amount

¹ The substantial points of the arguments will be found referred to in the judgment. The material sections of the local acts are set out in the report of *The Queen v. The Churchwardens of Longwood*, 18 Law J. Rep. (N. S.) M. C. 65.

² COLERIDGE, J., WIGHTMAN, J., and CROMPTON, J. LORD CAMPBELL, C. J., was sitting in the court for crown cases reserved.

at which the commissioners of the Huddersfield Waterworks ought to be rated to the relief of the poor in Longwood, as the occupiers of certain reservoirs, banks, pipes, lands, and hereditaments situate in the latter township, and the sessions have found that 490*l.* is the estimated net ratable value per annum of the premises above-mentioned, taken in connection with, and as part of the entire waterworks in Longwood and Huddersfield. It was conceded in the argument for the respondents that the rate must stand at that amount (with which the appellants were contented), unless they could show it ought to stand at a higher; and they contended that this was shown upon the following finding of the sessions:—that a yearly tenant of the entire waterworks, if released from the restrictions contained in the commissioners' acts of parliament, and able to exercise his discretion as to the amount of water rents and rates, might calculate on a gross revenue of 3,000*l.* from the works, which, after making the proper allowances and deductions would leave the sum of 1,100*l.* as the net ratable value of the entire works. The sessions having found this, the respondents insisted that, in order to arrive at the true ratable value, a tenancy must be supposed, unfettered by the statutory restrictions above alluded to. These, I understand to be the obligation to furnish water gratis in case of fire, to supply it at 1*d.* per hundred gallons for watering the streets, and to the consumers at certain specified rates, so calculated that the amount of the water rent is not in any one year after payment of the expenses to exceed 7½ per cent. on the amount of the debt which should be owing. The effect of which will be, that when the debt is extinguished the rent is only to be equal to the expenses. The cases mainly relied on and from which I think the principles are to be gathered by which the question before us must be decided, are *The Queen v. Longwood* and *The Queen v. Kenilmore*. In the former case, which related to the same appellants, and in which the preliminary facts were stated in the very same words as those now used, the only point decided was the ratability of the commissioners; but the court came to that conclusion in this way:—“If private speculators (say they) had invested capital for a supply of water at a profit, and had so become the occupiers of the premises in question at Longwood, they would have become ratable—*The Queen v. Mile End Old Town*,—and the money paid for the rate would be part of the costs of the supply, and would fall on the consumer. The private acts enable a portion of the inhabitants, by commissioners, to obtain the supply without the intervention of a water company. But as far as respects the rights of other townships, this portion of the inhabitants, by their commissioners, stand in the position of an ordinary water company, and have no greater right to exempt from ratability a portion of land in Longwood, and so to obtain water at a less cost than such a company would have had.” The court, therefore, arrived at the conclusion that the commissioners were ratable at all, by considering them as the representatives of the trustees for, and identical in interest with, a certain portion of the inhabitants of Huddersfield, and not merely as public officers acting for the public, and having no interest, but as members

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of the public. In *The Queen v. Kentmere* this view was adopted, and the ratability of the commissioners there was also established.

These cases appear to me to have been decided with great propriety, and I think they ought to govern our decision as to the question immediately before us. It is contended that the measure of ratability is the amount of rents which the commissioners in fact receive from the consumers of the water supplied, restricted as they are by the private acts, and consequently it must be contended that when all the outstanding incumbrances are paid off, and these rents are, under section 74, reduced so as merely to cover the current expenses, there will be nothing on which to rate at all; and this might be true if the commissioners were, like a water company, a body separate in interest from the consumers, and, being so, were also occupying a property which the legislature had made wholly unproductive of profit to them; whether that unproductiveness were the result of inherent and natural causes or of an act of the legislature, the same consequences might follow, the subject-matter of the rate would *de facto* have been limited in the first instance, and gradually have ceased to exist; but then the inhabitants of Longwood would have had reason to complain that a portion of ratable property had been withdrawn from contribution to their poor-rates for the benefit of certain inhabitants of Huddersfield. This, however, is prevented by looking at the commissioners and consumers as one body, trustees and *cestuis que trust* as it were, and when they are so considered, the restricting clauses become no more than an arrangement between themselves as to the terms on which the latter will enjoy the benefits flowing from the occupation of the land. These benefits are the supply of water for the various purposes enumerated in the act, and these arrangements have no bearing whatever on the question of ratable value as between themselves and the inhabitants of Longwood. If some munificent person should provide a fund to bear the whole expense of the works, so that the commissioners were to supply the water gratis to the consumers, it could not be contended that thereby the occupation had ceased to be beneficial or the occupiers not liable to be rated in respect of it, the fruits of the land would still be the water supplied, and consumers occupying through the commissioners must, through them, be rated as before.

The sessions find that if the supposed yearly tenant be to be considered as subject to the restrictions in the act, he could make no profit at all by his tenancy; and that is true, for substantially he could only receive such a return from the consumers as would be exactly equivalent to his outlay; and this seems to me to show that these restrictions can have no bearing on the question of the amount of the rate. It is said, that to discard the consideration of them is to make the commissioners pay, not on their actual receipts, but on imaginary ones, which they might under other circumstances receive. The answer is, that in substance the commissioners are not the occupiers, nor the parties rated; nor do the water rents represent the ratable value of the land; the consumers are the occupiers really; they are really rated, *i. e.* they pay the rate; and the use and enjoyment of the water constitutes the ratable value. I feel, therefore,

I confess, no difficulty on the question raised by the third and fourth findings of the sessions; the two cases cited seem to me to have concluded the court on this point, and to have decided it rightly; and, as to the suggestion which has been made that the commissioners should pay as an ordinary water company would pay, subject to the ordinary restrictions of a water company, the answer seems to me to be: first, they are not an ordinary water company, but an invention to avoid the necessity of a water company, and so to escape the payment of such prices as an ordinary water company, or any third party supplying water to customers, would require; secondly, I am not aware that the law imposes, or that the court can take notice of any restrictions on ordinary water companies. For myself, I really do not know nor does the case find what they are. But when I come to determine the specific question, whether the rate is to stand 490*l.*, or any thing higher, I feel a difficulty, because it is not stated on what principle the first sum is arrived at. It is stated to be "the estimated net ratable value per annum;" if so, of course it is the right sum. On the principle stated in the third finding, 1,100*l.* is made to represent the net ratable value per annum of the entire works in Longwood and Huddersfield; if 490*l.* be the proportion of the 1,100*l.*, which the sessions attribute to Longwood, then 490*l.* is the right sum, and has been arrived at on a right principle; at least the whole sum of 1,100*l.* has been arrived at on a right principle, and whether the proportions of the two townships are accurately struck in amount we have no means of ascertaining, and are not called on to ascertain. As the 490*l.* may be what the sessions have taken as the right proportion of the 1,100*l.*, I think I am bound to assume that it is; and on this ground I am of opinion for the appellants that the rate ought to stand at that sum.

My brothers, Wightman and Crompton, arrive at the same conclusion on somewhat different grounds; they do not think the case put by the sessions, of a tenant who may charge any rates he pleases, can furnish the proper criterion for the amount of a rate; in respect of property of this peculiar description, which could have no existence in the hands of a tenant or ordinary water company, without some legislative restriction as to the amount of rates, and they think that a fictitious and impossible value would be put upon the land by supposing the case of a water company or tenant, able to put their own price upon the water supplied, as no such company or tenant could obtain powers necessary for such an undertaking, without some legislative restriction as to the price of the water to be supplied. Not being satisfied with the criterion suggested in the third finding of the sessions, they concur with me in thinking that the rate must stand at 490*l.*, the sum which was to be taken as the proper amount, if the respondents failed in establishing the principle for which they contended.

Order of sessions confirmed.

Regina v. Major.

BAIL COURT.

REGINA v. MAJOR.¹

May 27, 1852.

Perjury — Costs of Prosecutor — Party grieved or injured.

Where a defendant was convicted on an indictment for perjury, in an affidavit, removed by himself by *certiorari* into the Court of Queen's Bench, the prosecutors were held entitled to costs under the statute 5 & 6 W. & M. c. 11, as "parties aggrieved or injured," although the false swearing failed of its effect and the prosecutors were only interested as executors in the suit in which the false affidavit was made.

THIS was an application to set aside a rule for the taxation of costs of a prosecution for perjury.

The defendant had been indicted for perjury, in an affidavit in chancery, relating to a claim for money alleged to be due from him to the estate of a deceased person, in which the prosecutors were interested as executors. The false affidavit did not obtain effect in chancery. The indictment, which was originally in the Central Criminal Court, had been removed into this court by the defendant by *certiorari*. The defendant was found guilty, and sentenced to imprisonment. A side-bar rule, to tax the costs of the prosecution, had been obtained.

Willes, in support of the application. The prosecutors are not entitled to costs. The statute 5 & 6 W. & M. c. 11, s. 3, contemplates the giving costs to the prosecutors only if he be the party "grieved or injured." As the perjury was ineffectual, the prosecutors were not parties grieved or injured. *The King v. Ingleton*, 1 Wils. 139, is in point, and shows that the attempt to injure does not entitle to costs.

WIGHTMAN, J. That case does not seem to me to apply. If the perjury has been completed, and may have caused damage to the prosecutors, I think it sufficient. This state of facts is very common, but I am not aware that it has ever been questioned but that the prosecutors are entitled to costs under such circumstances. The false affidavit put an obstruction in their way which they are compelled to remove.

Rule refused.

¹ 21 Law J. Rep. (N. S.) M. C. 221.

REGINA v. THE OVERSEERS OF SALFORD.¹

May 29, 1852.

Certiorari—3 & 4 Vict. c. 61, s. 2 — *Beer License* — *Board of Inland Revenue* — *Overseers, Certificate of*.

A license for the sale of beer, granted by the solicitor of excise, without the production of a certificate from the overseer, required by 3 & 4 Vict. c. 61, s. 2, is not a judicial act removable into this court by *certiorari*.

THIS was a rule calling upon the board of inland revenue to show cause why a license for the sale of beer, granted by a collector or supervisor of excise to one Hague, in the borough of Salford, which had been brought up by *certiorari*, should not be quashed, on the ground that it had been granted without the production of the certificate of the overseer required by the 3 & 4 Vict. c. 61, s. 2.

F. Thesiger, Attorney-General, (with whom were *F. Kelly, Solicitor-General*, *W. H. Watson* and *Welsby*), showed cause. This license is not a judicial proceeding; and no *certiorari*, therefore, will lie. He was then stopped by the court, who called on

Pashley and *R. Hall*, to support the rule. A *certiorari* clearly lies according to the decision of this court in *The Queen v. Kensington*, 12 Q. B. Rep. 654; s. c. 17 Law J. Rep. (N. S.) Q. B. 332. The granting a certificate under the 3 & 4 Vict. c. 61, s. 2, is not compulsory on, but discretionary with, the overseers, and they may, as they think fit, concede or refuse it. If, therefore, the board of inland revenue choose to give a license without requiring a previous certificate, they usurp the discretion of the overseers and assume the right of disputing the decision of those in whom the legislature have placed the right of judging.

[CROMPTON, J. You must show that they perform some judicial act. The license is granted by the collector or supervisor. Is he a judicial officer?]

He acts under the direction of the board of inland revenue. They claim to exercise a discretion, and wherever a discretion is exercised, it is a judicial act, although the jurisdiction may not be contentious. The authority in this case is conferred by statute, and its exercise may be reviewed by this court. County rates, orders of Quarter Sessions, regulating the scale of fees to be taken by a clerk of the peace for a county, (*The Queen v. Kensington*), recognizances, the examination of witnesses before justices, under 1 & 2 Ph. & M. c. 13, orders of church building commissioners for the stopping up of a pathway in a churchyard, (*The Queen v. Arkwright*, 12 Q. B. Rep. 960; s. c.

¹ 21 Law J. Rep. (N. S.) M. C. 223; 16 Jur. 907.

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18 Law J. Rep. (N. S.) Q. B. 26,) have all been deemed judicial acts, and removable into this court by *certiorari*.

COLERIDGE, J.¹ We are not called on to determine the extent or nature of the powers given to overseers by the 3 & 4 Vict. c. 61, s. 2. It may be that they are possessed of a judicial authority which is not subjected to revision by the supervisor or the board of inland revenue, and certainly I do not hold the superintendence of the overseers in this matter lightly; but the simple question is, whether the *certiorari* was properly issued; whether the license is a judicial act over which we have an authority, and I think clearly that we have not. The document in question is not more or less strong by reason of any thing that the board of inland revenue may have done, because there is an original authority in the collector and supervisor of excise to grant such a license. It is natural that he should, in such a case, apply for and receive instructions from the board above; but the document still proceeds from him. The dry question, then, is, does he exercise a judicial authority in granting the license? The license for want of the performance of a condition precedent, namely, the production of the overseers' certificate in pursuance of the 3 & 4 Vict. c. 61, s. 2, may be no license at all; and, if so, the person who acts under it may be proceeded against for a penalty under section 13; and that would bring the question before the court. As to that, however, I say nothing; but if we were to hold this to be a judicial act, liable to be brought up by *certiorari*, we should be opening the door to numerous applications, and so interfere with the acts of inferior officers as to lead to great mischief. Nothing in fact could be done under a parliamentary authority which might not be subject to revision in this court. The cases cited are manifestly distinguishable. The county rate is made by the Court of Quarter Sessions assembled and acting as a court, and exercising its judgment as to the necessary amount and other matters. In the examination of witnesses under the statute of Philip and Mary, and the more recent acts, the justice of the peace, though conducting a preliminary inquiry is also acting as a judge. So the church building commissioners, although not acting as a judicial body, were invested with judicial powers in the matter in question, they hold an inquiry, and hear objections; and their order, stopping a footpath through a churchyard, is clearly judicial, like the order of justices for stopping footpaths, and even more so, because in the former case there is no appeal. But the act of a collector or supervisor of excise in granting a license is of a totally different character.

CROMPTON, J. I am of the same opinion. Assuming that the board of inland revenue were wrong, and directed the officer to do an illegal act, and that he exceeded his authority in granting this

¹ LORD CAMPBELL, C. J., and ERLE, J., were attending the court for crown cases reserved.

license; his acting upon that order is not a judicial proceeding, and, therefore, ought not to have been removed by *certiorari*.

F. Thesiger then applied for costs.

COLERIDGE, J. The Master of the Crown Office informs us that there is no rule or practice against giving costs; and, this application is an experiment. Therefore, we think the rule should be discharged, with costs.

Rule to quash the license discharged, with costs, and the license sent back by procedendo.

REGINA v. SCAIFE and others.¹

June 10, 1852.

Practice — Judge at Chambers — Jurisdiction — Writ of Procedendo.

A judge at chambers has jurisdiction to make an order for the issuing of a writ of *procedendo* to send back proceedings removed by *certiorari* from an inferior court, and it is a matter for the discretion of the judge whether or not a summons to show cause should not in the first instance be granted.

In this case an indictment for robbery from the person, with violence, had been preferred and found at the Hull Borough Sessions. It was afterwards removed by *certiorari* into this court, and tried, at the York spring assizes, 1851, before Cresswell, J., when a verdict of guilty was returned. In Trinity term following, a rule for a new trial was made absolute by this court, and the case was again taken down for trial at the next assizes, before Platt, B., at the instance of the prisoners; but the learned judge, upon an application being made on the part of the prosecution, postponed the trial until the following assizes. At the last spring assizes two of the parties indicted applied to be tried, but it appeared that the record had not been re-sealed, and the learned judge (Alderson, B.), thereupon refused to try the parties. Subsequently, the prosecutor, without notice to the parties indicted, applied to Pollock, C. B., at chambers, and obtained, without summons, on the 26th of March, an order for a writ of *procedendo*, under which the indictment was sent back to the Hull Quarter Sessions, where the prisoners were soon after tried, convicted, and sentenced to ten years' transportation, the trial being objected to at the time on behalf of the prisoners, on the ground that they were not prepared.

Dearsley now moved for a rule *nisi* to set aside the writ of *proce-*

¹ 21 Law J. Rep. (N. S.) M. C. 221.

dendo and all subsequent proceedings. The lord chief baron, sitting as a single judge, at chambers, had no power to make the order for the *procedendo*. There is no power at common law to send back proceedings once removed and entered of record in this court. 4 Co. Inst. 73; *The King v. Wakefield*, 1 Burr. 485; *The King v. Clace*, 4 Burr. 2456. The power is given by the 6 Hen. 8, c. 6, but only to the "justices of the King's Bench," and, therefore, only to the full court. He referred to 2 Chitty's Arch. Prac. 1432, and cases there cited.

[COLERIDGE, J. The Master of the Crown Office reports to us that it has been the course and practice of this court for a single judge of the court at chambers to order a *procedendo* to issue; and if so, by the 1 & 2 Vict. c. 45, the same power is given to a judge of one of the other superior courts.]

Supposing the jurisdiction to exist, another objection is, that the writ ought only to have been issued upon a summons, calling upon the parties to show cause. In the full court it would have been done upon a rule to show cause.

[LORD CAMPBELL, C. J. Surely that objection ought to have been made long ago. It is in our discretion to grant a rule absolute here.]

It had the effect of taking the parties by surprise, and depriving them of a fair trial.¹

LORD CAMPBELL, C. J. I am of opinion that no ground for the application has been made out. The ground put forward is, that a single judge at chambers has no power to make an order for a writ of *procedendo*. There is now no distinction in this respect between a judge of this, and of any other of the superior courts of common law, under the 1 & 2 Vict. c. 45, and I have no doubt that a judge of this court has power to make such an order either in term or vacation. According to the practice that has prevailed, a judge at chambers may exercise a power of this kind, where it does not appear from the statute to be an application that must be made to the full court in term time, subject to their orders being confirmed or rescinded by the full court; and where there is a rule of court confirming the order, as there might have been in this case, it is then taken to be a rule of court. This, then, having been the practice, the power of the lord chief baron, to make the order in this case, is expressly given by the 1 & 2 Vict. c. 45, s. 1; and there is nothing to show that the power has not been properly exercised. If there is any reason for saying that the conviction is not satisfactory, it is to the secretary of state that an application must be made.

COLERIDGE, J. The question comes to this, whether what was done by the lord chief baron, was done in accordance with the course and practice of this court; and we have it on the best authority that it has been the practice for a judge at chambers to issue a *procedendo*, and, that being so, there was jurisdiction to make the order. Then,

¹ There were affidavits on the point of surprise.

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it is said, that the power ought only to have been exercised upon a summons to show cause, but the objection cannot be sanctioned, as that is a matter for the discretion of the judge, under all the circumstances of the case; and we are not to interfere merely on the ground of mischief or inconvenience, supposing such to exist.

ERLE, J. The question of jurisdiction is quite different from the question of discretion; and I draw the distinction, not presuming to sit in judgment upon those whom the law has empowered to exercise a discretion as to whether they have acted rightly or wrongly. I have no concern with that, and only say that it is to be presumed that the discretion has been properly exercised. Then, as to the point of jurisdiction. I see no distinction between a proceeding in felony, and any other, and I am clearly of opinion that it has been the course of practice for a judge at chambers to issue a writ of *procedendo*; and there is nothing in the statute creating the jurisdiction of the court, which tends to show that the power is to be confined to the full court. The statute seems to me to make it a matter of most ordinary jurisdiction. I am of opinion, therefore, that jurisdiction existed to make the order in question.

CROMPTON, J., concurred.

Rule refused.

RAIL COURT.

REGINA v. THE MAYOR AND ASSESSORS OF HARWICH.¹

November 9, 1852.

5 & 6 Will. 4, c. 76, s. 17, (*Municipal Corporation Act*)—*Notice of Objection.*

The notice of objection served upon a burgess, to his name being retained on the list of burgesses, should contain his description as he is described on the burgess list.

LUSH moved for a rule calling on the mayor and assessors of Harwich to show cause why a mandamus should not issue, commanding them to hear and adjudicate upon an objection taken to one William Butcher, jun., whose name was on the burgess list of that borough, and was objected to. By the 6 & 7 Will. 4, c. 76, (*Municipal Corporation Act*), the overseers are to make out a list, every year, of persons entitled to be on the burgess roll. By the 17th section it is enacted, "that every person whose name shall have been inserted in any burgess list for any borough, may object to any other person as not being

¹ 16 Jur. 995. Before CROMPTON, J.

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entitled to have his name retained in the burgess list for the same borough; and every person so objecting, shall, on or before the 15th day of September, in every year, give to the town clerk of such borough, and also give to the person objected to, or leave at the premises for which he shall appear to be rated in the burgess list, notice thereof in writing, according to the form No. 3, in the said schedule (D.), or to the like effect." The form is as follows:—

"To the town clerk of the borough of —, [or to the person objected to, as the case may be.]

"I hereby give you notice that I object to the name of Thomas Bates, of Brook's Farm, in the parish of —, [describe the person objected to, as described in the burgess list], being retained on the burgess list of the borough of —.

"Dated the — day of —, in the year —.

"(Signed) JOHN ASHTON, of [here state place of abode, and property for which he is said to be rated in the burgess list.]"

This form is a compendious form, adapted for service on both the town clerk and the burgess, unlike that given by the Parliamentary Registration Act, 6 & 7 Vict. c. 18, in the schedule to which there is a form for each. The notice in this case served on the town clerk was precisely in the form given by the act. The notice served on the burgess was as follows:—

"To Mr. William Butcher, jun.

"I hereby give you notice that I object to your name being retained on the burgess list of the borough of Harwich.

"Dated the 15th September, 1852.

"JOSEPH GANT."

At the foot was —

"My place of abode — King's Head-street, St. Nicholas parish. The property for which I am said to be rated in the burgess list — House, King's Head-street, St. Nicholas, Harwich."

A number of persons were objected to in the same manner, so that this case would decide them. Upon the day for revision, service of notice of objection having been duly proved, it was urged on behalf of the party objected to, that the notice served on the burgess was not in conformity with the statute; and the mayor and one of the assessors held the objection fatal. The other assessor was against the objection. The names, therefore, of all these parties, remain on the list. The objection was, that the notice should be exactly like the form, and in the third, not the second, person. The section says, "to the like effect."

[CROMPTON, J. The description is altogether left out.]

Yes; but there is no doubt about the identity, and he was himself present objecting.

In re ———.

[CROMPTON, J. There might be two persons of the same name.]
It is sworn that there were not.

CROMPTON, J. But that will not alter the effect of the statute. The fact, whether there are several of the same name, may be one which they ought not to have to inquire into. I do not think that the provision of the act of parliament has been carried out in this case. The effect of the act is to give a description as in the burgess list. It may be that there are two of the same name, and the legislature may have intended that no such question should be raised.

*Rule refused.**In re* ———.¹

Nov. 6 and 11, 1852.

County Court Judge — Criminal Information.

A summons was issued against a judgment debtor, under the 98th section of the 9 & 10 Vict. c. 95, in the usual form, calling upon him to appear, and to be examined by the judge of the court touching his estate and effects, and the manner and circumstances under which he contracted the debt which was the subject of the action in which the judgment was obtained, and as to the means and expectation he then had, and as to the property and means he still had, of discharging the debt, and as to the disposal he might have made of any property, &c. The defendant appeared, and was duly sworn. The judge asked him whether he was prepared to pay; he answered in the negative, and was entering into an explanation of the circumstances, when he was stopped by the judge, who ordered his immediate committal to prison:—

Held, that these circumstances afforded no ground for a criminal information, there being no imputation of a corrupt motive on the part of the judge.

HAWKINS moved for a rule calling upon the judge of a county court to show cause why a criminal information should not be filed against him under the following circumstances:— An order had been made for the payment of a debt by instalments, and on default a summons was issued, under the 98th section of the 9 & 10 Vict. c. 95, in the usual form. Upon the hearing, the judgment debtor was duly sworn, and when the judge asked him whether he was prepared to pay, he answered "No," and was about to explain his reasons for not paying; the judge stopped him, and ordered him to be committed. It was now contended, that this refusal to hear the judgment debtor was such misconduct in the judge as would render him liable to a criminal information.

[CROMPTON, J. Have you any evidence of corruption? There must be a charge of corruption upon which to ground an application for a criminal information. The party might apply to have the judge removed under the statute.]

This is precisely the same case as that of a magistrate, who is

¹ 16 Jur. 995.

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bound to hear any thing a prisoner or defendant has to say. The oath was administered to him well and truly, to answer all questions, and yet, whilst he was attempting to do so, the judge had stopped him, and prevented him from entering into any explanation.

CROMPTON, J. If the judge was mistaken as to the course of proceeding under the act, he cannot be proceeded against by criminal information. I think it of great importance that judges presiding over these courts should not be liable to have their proceedings canvassed in this shape. I will look at the affidavits.

Cur. adv. vult.

Nov. 11. CROMPTON, J. I have perused the affidavits in this case, and am quite satisfied that the view I took upon the argument is correct. There is not that imputation of a corrupt motive which governs the discretion of this court in granting criminal informations.

Rule refused.

BOSTOCK v. SIDEBOTTOM; SIDEBOTTOM v. BOSTOCK, in error.¹

April 30 and June 14. 1852..

Deed, Construction of — Power to make a Goit or Sluice — When Exhausted.

Trespass for breaking and entering plaintiff's close, and cutting down the sides of a sluice or goit there, and widening the same. Plea, justifying the trespass under a deed, dated the 12th July, 1800, by which plaintiff demised land to W. S. and G. S., (under whom defendant claimed), for 999 years, and by which power was given to W. S. and G. S. to cut a goit or sluice through plaintiff's close in a certain direction, and also power from time to time during the term to repair and amend the said goit or sluice, making reasonable satisfaction to plaintiff for damage done thereby to the grass of plaintiff; provided that, for the term of two years from the commencement of the rent, no trespass or damage should be charged or paid for. Replication, that before the expiration of two years from the commencement of the rent, and during the said term, W. S. and G. S., in the due exercise of the said power, cut, made, and completed a certain goit or sluice in such direction as in the indenture mentioned, and through the close in the indenture, and in the plea mentioned, being the same goit or sluice in the declaration and in the plea in that behalf mentioned, which said goit, when so cut, made, and completed, was of the width in the plea in that behalf mentioned; and that the said goit or sluice, being so then cut, made, and completed, and then being of the width aforesaid, remained and continued of the width aforesaid, and in that state and condition was used and enjoyed until defendant, under color of the said indenture, and in pretended further exercise of the said power, broke and entered the close of plaintiff:—

Held, upon demurrer, (by the Queen's Bench and Exchequer Chamber), that the power given in the deed to make a goit or sluice, having been once exercised, was exhausted, and therefore the replication was good.

THIS was an action directed to be brought by the Court of

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Chancery. The declaration was in trespass for breaking and entering the plaintiff's close, called the Em Meadow, and cutting down the sides of a certain sluice, goit, or watercourse there, and widening the same. Plea, that before and at the time of the making of the indenture hereinafter mentioned, John Bostock, since deceased, was seised in fee of the said close called the Em Meadow, and also of a certain other close in the said indenture mentioned; and being so seised, heretofore, to wit, on the 12th July, 1800, by a certain indenture, then made between the said John Bostock, deceased, of the one part, and William Sidebottom and George Sidebottom of the other part, (*profert*), demised to them, their executors, administrators, and assigns, certain pieces of land, being parts of certain closes of the said John Bostock, deceased, called respectively Great Broadbottom and Great Meadow, as being intended for a mill-dam or reservoir for water; also a certain part of the watercourse or bed of a certain river in the said indenture mentioned, called the Mersey; and also full and free liberty, privilege, and authority to make a weir or dam across the said river any where opposite to and adjoining the said close called the Em Meadow, but not to make such weir or dam so as to injure a certain county bridge over the said river, or to hinder the water from flowing down the tail goit of a certain mill, situate near the said bridge, on the same level on which it then flowed; also, full and free liberty, privilege, power, and authority to cut a goit or sluice out of the said river, at a proper and convenient distance from and above the said weir, in the most convenient line or direction, through the said close called the Em Meadow, and the said other close of the said John Bostock, deceased, called the Lime Field, into the south-westerly side or end of the said plot or piece or parcel of land or ground so in the said indenture described as intended for a reservoir, as aforesaid, and also to make, erect, build, and fix a fender or shuttle at the mouth of such goit or sluice, and also to erect, build, and fix a bye-wash or waste-gate, at or by the side of such goit or sluice, in any part of the same close called the Em Meadow, and cut a drain from such bye-wash or waste-gate into the said river, and, from time to time, and at any time or times, to turn and divert the water of the said river into and through the said fender and goit or sluice, and also into and through the said bye-wash or waste-gate and drain, or any of them; also full and free liberty, privilege, power, and authority to make, and from time to time to repair, a drain or sough from a certain other close of the said John Bostock, deceased, called the Bank, to and into the said plot, piece, or parcel of land or ground, parcel of the said closes, or fields called respectively Higher Croft and Lower Croft, so by the said indenture demised as aforesaid, and the liberty and privilege to turn and convey one half of the water of a certain spring, in the said indenture described as arising in the said close called the Bank, into and through the said last-mentioned drain or sough, for the use and benefit of the said last-mentioned demised plot, piece, or parcel of land or ground, and the several owners, tenants, and occupiers thereof; and full and free liberty, privilege, power and authority,

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from time to time, and at all times, during the term by the said indenture granted, to view, examine, carry, and lay down materials, and repair and amend the said weir or dam and also the said goit or sluice, fender or shuttle, bye-wash or waste-gate, and drains, when so made as aforesaid, or any of them, when, and as often as need or occasion should be, and require, making reasonable satisfaction to the said John Bostock, deceased, and his heirs and assigns, for all damage to be done or occasioned thereby to the grass or herbage of him, the said John Bostock, deceased, and his heirs and assigns, as thereafter, and hereinafter particularly mentioned, expressed, and declared of and concerning the same; to have and to hold the said several pieces of land, liberties, privileges, and powers, and all and singular other, the premises, with their appurtenances, unto the said William Sidebottom and George Sidebottom, their executors, administrators, and assigns, for the term of 999 years, at the rent of 84*l*. There was a covenant by William Sidebottom and George Sidebottom to make satisfaction to John Bostock, his heirs and assigns, for all damages done to the lands of John Bostock, from time to time, in exercise of all or any of the liberties, privileges and powers by the said indenture granted, save and except for the term of two years, from, and next ensuing the commencement of the said rent, during which time no trespass or damage should be charged or paid for. There was a covenant by William Sidebottom and George Sidebottom, within four years from the date of the indenture, to erect one or more good and substantial building or buildings upon the Higher Croft and Lower Croft, at the yearly rent of 170*l*.; also a covenant by them to cover over the said goit or sluice, so to be cut and made through the said Em Meadow, save and except for the distance of twelve yards in length next adjoining the said intended bye-wash or waste-gate, with good stone or brick, and afterwards cover the same again with soil, so as to make the same into good arable or mowing land or ground, and during the same term to keep and continue the goit or sluice so covered with soil in a good and workmanlike manner.

The plea then stated, that, by virtue of the said indenture, William Sidebottom, and George Sidebottom entered into the demised tenements, and became entitled to the liberties, privileges, and powers by the said indenture granted; and deduced title to the defendant. Averment, that he, the said defendant, being, and continuing, at the said times when, &c., so possessed of the said demised tenements, with the appurtenances, and entitled to the said liberties, privileges, and powers; and a certain weir or dam having been before then, and after the making of the said indenture, and during the said term thereby granted, to wit, on, &c., under and by virtue of the said indenture, and in the due exercise of the said liberties, privileges, and powers, made, built, and fixed, and at the said times when, &c., being, and continuing so built and fixed, in, through, and across the said river Mersey, at such part or place of, and in the said river, and so and in such manner, as in and by the said indenture in that behalf mentioned and required as aforesaid; and a certain goit or sluice,

being the said sluice, goit, or watercourse in the said declaration mentioned, having also been before then, and after the making of the said indenture, and during the said term thereby granted, to wit, on, &c., under and by virtue of the said indenture, and in the further due exercise of the said liberties, privileges, and powers, cut and made, to and of such width as hereinafter in that behalf mentioned, out of the said river Mersey, at such distance from and above the said weir, and in such direction and through such closes, as in the said indenture in that behalf mentioned and required as aforesaid, into the south-westerly side or end of the said plot, piece, or parcel of ground in the said indenture mentioned, and therein described as intended for a reservoir as aforesaid, but the said sluice, goit, or watercourse, not having been, and not being, at the said times, when, &c., or any of them, cut or made to or of a sufficient width, and the same having been and being then completed, and cut and made to and of a certain small width only, to wit, the width of nine feet; and such width being a wholly insufficient width in that behalf, so that without widening the said sluice, goit, or watercourse to the extent hereinafter mentioned, and keeping and continuing the same so widened, the said defendant could not have or enjoy the use and benefit of the said demised tenements, with the appurtenances, and of the said water of the said river Mersey, in so free and ample a manner as he otherwise might and could, and then ought, and was entitled to have and enjoy, and still might and is entitled to have and enjoy the same, under and by virtue and according to the tenor and effect, and true intent and meaning of the said indenture; and the said defendant, being then able, and ready, and willing, upon the said sluice, goit, or watercourse being so widened as aforesaid, to cover over the same (save and except as in the said indenture in that behalf is excepted) with good stone or brick, and after cover the same again with soil, so as to make the same into good arable or mowing land or ground, and to keep and continue the same so covered with soil in a good and workmanlike manner, he, the said defendant, at the said times when, &c., for the purpose of so widening and amending the said goit as aforesaid, and in the further due exercise of the said liberties, privileges, and powers by the said indenture granted, did enter the said close of the plaintiff, called the Em Meadow, and did then, for the purpose aforesaid, cut down the side of the said sluice, goit, or watercourse there, and did then widen the said sluice, goit, or watercourse, from the said then insufficient width of the same, as aforesaid, to a certain proper and reasonable width in that behalf, in the whole not exceeding the width of which the defendant then was, and still is entitled to have the same, under and by virtue of the said indenture, according to the tenor and effect, and true intent and meaning thereof, for the having and enjoying by him, the said defendant, of the use and benefit of the said demised tenements, with the appurtenances, and of the said water of the said river Mersey, in such free and ample manner as aforesaid, to wit, to the extent, in the said declaration in that behalf mentioned, and kept and continued the same so widened for the said time in the said declaration in that behalf mentioned, doing no unnecessary damage, &c.

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Replication, that after the making of the said indenture, and before the expiration of two years from the commencement of the said rent, and during the said term, and long before any of the said several times when, &c., to wit, on the 1st August, 1800, the said William Sidebottom and George Sidebottom, "in the due exercise of the said liberties, and privileges, and powers, cut, made, and completed a certain goit out of the said river Mersey, in the said indenture and in the said plea mentioned, at such distance from and above the said weir, in the said indenture and in the said plea mentioned, and in such direction as in the said indenture mentioned and required, and through the said closes in the said indenture and in the said plea mentioned, being the same goit, sluice, or watercourse in the declaration and in the said plea in that behalf mentioned, which said goit, when so cut, made, and completed, as aforesaid, was of a certain width, to wit, of the width in the said plea in that behalf mentioned, and then arched and covered over the said goit, according to their covenant in that behalf in the said indenture contained." Averment, that the said goit being so then cut, made, and completed, and being so then arched and covered over, and then being of the width aforesaid, remained and continued so arched and covered over, and of the width aforesaid, during all the time next hereinafter mentioned, and in that state and condition was used and enjoyed by the several persons, from time to time, possessed of the said demised tenements, with the appurtenances, and entitled to the said liberties, privileges, and powers, from the 1st August, 1800, continually, until the defendant, on the said 20th December, 1850, he being then so possessed and entitled as last aforesaid, under colour of the said indenture, and in pretended further exercise of the said liberties, privileges, and powers, broke and entered the said close of the plaintiff, called the Em Meadow, &c., in manner and form as in the declaration alleged. Verification. Demurrer and joinder therein. The demurrer was argued in the court below in Easter term, (April 30), by

Maynard, for the defendant. The goit not having been before completed to the entire width which the defendant is entitled under the indenture to have it, but having been made and cut to an insufficient width, he had a right, under the indenture, to widen and complete it to the entire width, making, if such amendment and completion took place after two years from the commencement of the rent, reasonable satisfaction. That right is not lost by the mere fact of the goit having for a time remained and been used of a less width. There is no express or implied limitation of the time within which the right may be exercised, other than the duration of the term of 999 years. In *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472, the canal company were empowered by act of parliament to make a canal within certain limits as to locality, but without limitation as to the time within which it was to be completed; and it was held, that the canal having been constructed and opened to a certain point in 1816, the works might be resumed in 1835. A thing may be completed in part; and in this grant there is "full and free liberty,

privilege, power, and authority, from time to time, and at all times, during the term by the said indenture granted, to view, examine, carry, and lay down materials, and repair and amend the said goit or sluice." [He cited *Dand v. Kingscote*, 6 M. & W. 174, and *Bishop v. North*, 11 M. & W. 419.]

J. A. Russell, contra. Unless the goit was merely made for experiment, and was never a complete goit, and used as a complete goit, the plaintiff is entitled to judgment, though the goit may not be of a width such as it might have been made in the first instance. The deed contains a covenant, that if the powers were exercised within two years after the commencement of the rent, they should be exercised without there being any claim to damage. The rent was to commence on the 12th November, 1801, and the replication states that before the expiration of that period the goit was made, completed, and arched over, and from that time up to the day of the trespass, namely, the 20th December, 1850, it was used and enjoyed by the parties from time to time entitled to the privileges and powers under the deed. In the replication the time is not laid under a *vide licit*, though in the plea it is. After the goit has once been made of a certain width, and completed to the satisfaction of the lessee, there is no power under the deed to enter and widen it; the only power which remains is to amend it. The rule as to the construction of grants is laid down in *Mildmay v. Standish*, Cro. Eliz. 34, 35. "Every grant shall be expounded as the intent was at the time of the grant; as, if I grant an annuity to J. S. until he be promoted to a competent benefice, and at the time of the grant he was but a mean person, and afterward is made an archdeacon, yet if I offer him a competent benefice, according to his estate at the time of the grant, the annuity doth cease." Supposing, at the time of the grant, it was within the contemplation of the parties that a mill, with a wheel of fifty-horse power, should be erected on the land, and after the goit had been made and completed, and used for the purpose of turning a wheel of that power, an increase of the defendant's business, in course of time, made it necessary to have an additional wheel, it would not be consistent with the grant that the defendant should enlarge the goit for the purpose of turning a wheel of 100 horse power. It is the natural inference from the language of the grant, that the intention of the parties was that a goit should be made for some purpose in view at the time; and when the goit was made and covered over and completed, the grant was exhausted. The power to repair and amend does not include a power to widen the goit; and it was expressly given in order to protect the grantor, because it is mixed up with a reservation of a right to compensation to the grantor for the trespass or injury done to his land in the exercise of the power. In *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472, at the time when the works were resumed, the canal had not been completed. In *Dand v. Kingscote*, 6 M. & W. 174, the covenant was that the grantees should have sufficient wayleave to certain mines, and it was not a covenant by the grantees to make one way.

Maynard, in reply. There is nothing to show that the goit was ever completed to the satisfaction of the grantee. It is pleaded that the goit cut and made in the first instance was wholly insufficient for the purpose.

[WIGHTMAN, J. The replication is, that before the expiration of two years next ensuing, the lessee cut, made, and completed a certain goit, being the same goit in the declaration and in the plea mentioned, and cut, used, and enjoyed it down to the time when the trespass was committed.]

LORD CAMPBELL, C. J. It was completed at some point of time before the alleged cause of action accrued.]

The cause of action may have accrued at any distance of time, except with reference to the Statute of Limitations. There is no precise allegation that the goit was used and enjoyed for such a length of time that the grantor was entitled to infer that it was satisfactory, and not intended to be widened. If there had been such an allegation, issue might have been taken on it. Therefore the question upon the pleadings is, whether, after this goit had been once cut to a certain width, it could not afterwards, at however short an interval of time, be widened, if it was found to be insufficient.

LORD CAMPBELL, C. J. I am of opinion that the plaintiff is entitled to our judgment. The plaintiff having complained of a trespass in his close, the defendant relies on the power to make a goit. Then the replication shows that that power had been exercised; and having been once exercised, I am of opinion it is exhausted. There is a power to repair and amend, but not a power to make another goit. Now, I think this must be taken to be another goit, and not the goit originally made. The replication expressly avers, that the said William Sidebottom and George Sidebottom "cut, made, and completed a certain goit out of the river Mersey, in the said indenture and in the said plea mentioned, at such distance from and above the said weir in the said indenture and in the said plea mentioned, and in such direction, as in the said indenture mentioned and required, and through the said closes in the said indenture and in the said plea mentioned;" showing a complete exercise of that power. Then, if this power was not to be exercised *toties quoties* it is gone, and affords no justification for the trespass. If Mr. Maynard could have made out that this power might be exercised from time to time in any direction, so as to suit the purposes of the lessees and their assigns during the term of 999 years, then it might be so exercised, as well with regard to the width as to the direction; but the power is "to cut a goit or sluice out of the said river at a proper and convenient distance from and above the said weir, in the most convenient line or direction, through the said close called the Em Meadow." If the defendant could have shown, that, after having made one goit, and enjoyed it for a number of years, there remained a power to make another in a direction more convenient, he would have succeeded. But the power granted is to make a goit; and when that goit is once made and completed, the power is exercised, and cannot be exercised in making another goit,

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either of a greater width or in a different direction; and therefore the replication is an answer to the plea.

The cases which Mr. Maynard has referred to do not apply. In *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472, the canal had never been completed; a part only of the canal had been made. In *Dand v. Kingscote*, 6 M. & W. 174, and *Bishop v. North*, 11 M. & W. 419, there was a power to make various roads *toties quoties*; it was not one power, but a power which might be exercised from time to time during the whole occupancy.

For these reasons, I am of opinion that the replication to the plea is good, and we are bound to give judgment for the plaintiff.

WIGHTMAN, J. Considering the powers which are given by the indenture, and the mode in which the power of cutting a goit or sluice has been exercised by the defendant, it appears to me clearly to contemplate the making of a goit once for all, and not experimentally making a goit which might probably be considered not completed; the goit, when completed, may be repaired and amended upon compensation being given, but there is no power to make such an alteration as that which is now contended for.

It appears from the plea, that a goit was cut, made and completed, and, from the replication, that it was completed within two years from the commencement of the rent, which, by the indenture, was to commence in 1801; and the replication avers, in express terms, that it is the same goit, sluice, or watercourse, in the declaration and in the plea in that behalf mentioned. It seems to me that the power given was exhausted if once the goit was completed, with the exception only of the power to repair and amend it; and therefore the plaintiff is entitled to our judgment, the replication containing a sufficient answer to the plea.

ERLE, J. I think that the power of making a goit in the plaintiff's land was to be exercised once for all; that the power to repair and amend from time to time might be repeated as necessity might require, and amending would not at all extend to constructing a new goit of different dimensions. The provision that the power granted should be exercised within two years without compensation, and after that time on making compensation, indicates an intention, which may well have been in the mind of the grantor, that the grantee, at the expense of making the works anew, should be allowed to make them without paying him compensation, but after they were once made and completed, if damage was done to his land by the coming in to repair and amend, there should be compensation for such damage.

CROMPTON, J., concurred.

*Judgment for plaintiff.*¹

¹ See next page for a report of this case upon a writ of error in the Exchequer Chamber.

SIDEBOTTOM v. BOSTOCK, in error.

UPON the foregoing judgment a writ of error was brought, which was argued on the 14th June, before JERVIS, C. J., PARKE, B., CRESSWELL, J., PLATT, B., and TALFOURD, J., by

Collier, (*Maynard* was with him), for the plaintiff in error, (the defendant below). The issue raised is, whether the defendant, being entitled to the whole of the water, had a right to widen the goit so as to admit a sufficient supply of water. If he had increased the width beyond what he was entitled to under the indenture, the plaintiff might have new assigned. He is not precluded from increasing the width, by having made it and used it for a certain time, any more than he would be precluded from narrowing or deepening it.

[PARKE, B. The power to make the goit is a single power, to be exercised at one time.]

It is unreasonable so to construe it during the whole period of ninety-nine years.

[JERVIS, C. J. Was not the defendant to make a final and irrevocable mill-pond?]

A reasonable limit must be assigned to the time within which he is to make it. Every grant is adaptable to the circumstances of the case. *Senhouse v. Christian*, 1 T. R. 560; *Dand v. Kingscote*, 6 M. & W. 174.

[PARKE, B. The defendant would be obliged to occupy a part of the plaintiff's meadow while he opened the arch and enlarged it.]

The powers will be exercised subject to the right of the grantor to compensation. *Bishop v. North*, 11 M. & W. 418. The plea is, that the goit was not completed to a sufficient width.

[He cited *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472; *Hall v. Swift*, 4 Bing. N. C. 381; and *Luttrell's case*, 4 Rep. 86, a.]

J. A. Russell, contra, was not heard.

JERVIS, C. J. The goit having been made, the power given by the grant is exhausted.

PARKE, B. A much more onerous servitude is thrown upon the owner of the servient tenement, if the grantee may enter upon his land and alter the goit from time to time.

Judgment affirmed.

Bishop v. Hatch.

BISHOP v. HATCH.¹

May 7, 1852.

1 & 2 Vict. c. 110, s. 17 — *Judgment Debt — Interest — Separate Writ of Execution — Satisfaction on the Judgment Roll.*

Where a judgment had been entered up, and a writ of execution for debt and costs had issued, before the commencement of stat. 1 & 2 Vict. c. 110: —

Held, that, by virtue of sect. 17, the judgment was not satisfied upon the levy, after the commencement of the act, of the debt and costs, and that it would not be satisfied until payment of interest from the commencement of the act until the satisfaction of the judgment.

Seemle, that the interest might be levied by virtue of a separate writ of execution, to be issued after the passing of the act.

HATCH was a beneficed clergyman, whose benefice was sequestered in the early part of the year 1833. Later in 1833 the plaintiff brought an action against him on the penalty of a bond, and recovered judgment. Final judgment was signed in Hilary term, 1833, and thereupon a writ of *seq. fa.* issued. Such writ was only to levy the judgment debt and costs, not any interest. The judgment debt was wholly unpaid in 1838, when stat. 1 & 2 Vict. c. 110 came into operation. It was not till February, 1851, that the earlier sequestrations were satisfied, and that the plaintiff's sequestrators had obtained money into their hands. Before they paid it over, and whilst they were still in possession of the benefice, the plaintiff obtained a new writ of *seq. fa.* for interest upon his judgment debt. The debt and costs being satisfied, the interest alone remaining unsatisfied, the defendant had obtained a rule calling upon the plaintiff to show cause why satisfaction should not be entered upon the judgment roll; against which,

Phipson now showed cause. The first question is, whether, under the circumstances, the plaintiff is entitled to interest. The second, whether, assuming him to be entitled to interest, he can recover it under the second sequestration issued. Both questions depend upon the 1 & 2 Vict. c. 110, s. 17, by which it is enacted, that every judgment debt shall carry interest at the rate of 4l. per cent. per annum from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up, and not carrying interest, until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment. That section contains two enactments, under the first of which the plaintiff was entitled to interest, under the circumstances, from the date of the act of parliament; and under the second of which he was entitled to enforce his claims by means of a writ of *seq. fa.*, unless deprived by laches. But there was no laches on the part of the plain-

¹ 16 Jur. 1044.

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tiff. He was not called upon to issue the second writ of *seq. fa.*, whilst earlier sequestrators than his were in possession; because, until they were satisfied, no writ issued at his instigation could take effect. The court would not have granted the issue of the writ. *Watkins v. Hartley*, 5 Dowl. & L. 226.

Willes and *Mills*, contra. The act points out one only remedy by which the interest which it gives to a judgment creditor can be recovered, and that is by the ordinary writ of execution which issues to enforce the judgment. The act only applies when interest is claimed by that writ of execution. It is, therefore, inapplicable to a case in which not only was the judgment entered up before the passing of the act, but also the writ of execution was issued before the passing of the act. At all events, there is nothing in the act to authorize the issue of a second writ of execution to levy the interest alone.

[WIGHTMAN, J. But if not, what remedy is there for the interest?] If it be held that the plaintiff might have abandoned his first writ of sequestration, and issued another for debt, costs, and interest, yet it does not follow that he might preserve his priority over other creditors by means of his earlier and insufficient writ for debt and costs, and also come for a new writ for interest. He cannot amend the earlier writ to the injury of subsequent sequestrators, and no such thing was ever heard of as a separate remedy for interest only. *Dixon v. Parkes*, 1 Esp. 110, note.

WIGHTMAN, J. I am of opinion that this rule should be discharged. By the statute the plaintiff was clearly entitled to claim interest on the judgment entered up before the passing of the statute, from the commencement of the statute. It would be rather a strong thing to hold, that, with such an undoubted claim given by virtue of the statute, the plaintiff had no remedy. The statute says that the remedy for the interest shall be by a writ of execution on the judgment. It does not say by what writ, but there is nothing to show that it may not be by a writ of *seq. fa.* At all events, we cannot say that the judgment is satisfied whilst it can be made to appear that the interest upon it, given by the statute, has not been paid in one way or another.

ERLE, J. I am quite clear that the defendant is not entitled to oblige the plaintiff to enter satisfaction on the judgment roll. The statute expressly gives a claim for interest upon a judgment entered up before the passing of the statute. How then can such a judgment be satisfied until the interest is paid in one way or another? I see no reason why there should not be a separate writ of execution for the interest. It may be that such a writ is unusual, and that there is no such writ in form. But it seems to me that the right to interest is clear, and if that be so, since forms are subservient to rights, there must be a remedy. If there is a remedy, clearly the judgment is not satisfied.

CROMPTON, J. I also am quite clear that the judgment is not satis-

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fied. There can be no doubt that, under the statute, the plaintiff is entitled to interest. That interest is not paid. It seems to me that it is a debt on the land, and that the land might be bound by *elegit*. But, whatever may be the formal remedy, I am quite clear that the judgment is not satisfied.

Rule discharged.

In re STEWART, Treasurer to the Commissioners of Birkenhead, v. JONES.¹

November 8, 1852.

Paving-rate—Action in Courts at Westminster—1 Vict. c. 33, s. 18—County Court—Jurisdiction—9 & 10 Vict. c. 95, s. 58.

Sect. 18 of stat. 1 Vict. c. 33, (local and personal, public), authorized commissioners to pave the streets of B., and enacted that the expenses thereof should be sued for "in any of her majesty's courts of record at Westminster:—

Held, that by virtue of sect. 58 of stat. 9 & 10 Vict. c. 95, the county court had jurisdiction over a suit founded on sect. 18 of stat. 1 Vict. c. 33.

C. POLLOCK moved for a rule calling upon the plaintiff and the judge of the county court of Cheshire, holden at Birkenhead, to show cause why a writ of prohibition should not issue, and why proceedings in the cause should not in the meantime be stayed. It appeared from the affidavits that the plaint was sued by the plaintiff, as treasurer to the commissioners of Birkenhead, in the county court of Cheshire, holden at Birkenhead, to recover the sum of 8*l.* 10*s.* 8*d.*, being the defendant's proportion of a paving-rate made by the commissioners under and by virtue of stat. 1 Vict. c. 33, (local and personal, public), intituled "An act to amend stat. 3 Will. 4, c. 68, intituled 'An act for paving, lighting, watching, cleansing, and otherwise improving the township or chapelry of Birkenhead, in the County Palatine of Chester,' &c." Sect. 18 authorized the commissioners to pave the streets, and declared that the charges thereof should be reimbursed to them by the occupiers, or persons in possession, or the owners, paying a proportionable share to be ascertained by the commissioners, and enacted as follows:—"And if any such occupier, or person in possession, or owner, shall, at any time, refuse or neglect to pay such proportion of the said charges and expenses so to be ascertained as aforesaid, the same shall be levied by distress and sale of the goods and chattels of such occupier, or person in possession, or owner, in like manner as the rates hereinafter directed and required

¹ 16 Jur. 1020.

to be raised and levied are authorized to be recovered, or shall, and may, be sued for and recovered, together with full costs of suit, in any of her majesty's courts of record at Westminster." It was objected before the judge that the plaintiff was founded alone on that section, and therefore the county court had not jurisdiction to entertain it; but the judge overruled the objection, and gave judgment for the plaintiff. The question is, whether the county court has jurisdiction over this cause, which is founded on sect. 18 of stat. 1 Vict. c. 33.

[LORD CAMPBELL, C. J. Where new rights are created with an appropriate remedy, that remedy is exclusive. See *Marshall v. Nicholls*, post. But stat. 1 Vict. c. 33, was passed before stat. 9 & 10 Vict. c. 95, which does not except this action from the jurisdiction of the county court.]

No action would lie to recover the rate in question, if sect. 18 had not given a right of action. Some statutes, as the Apothecaries Act, 55 Geo. 3, c. 194, s. 36, have given an action for penalties and forfeitures in any of the courts of record in England or Wales; others, as this statute, have given a right of action only in the courts at Westminster, intending that the matter should not be litigated in the local courts, because there was a local reason against trying the action in those courts. There are numerous statutes establishing local courts, in some of which, as in stat. 2 & 3 Vict. c. 85, for establishing the court of the honor of Pontefract, there is a clause enacting, that nothing in the act shall affect the jurisdiction of any of her majesty's courts at Westminster. Though sect. 3 of stat. 9 & 10 Vict. c. 95, makes the county courts courts of record, it does not take from them their character of local courts.

[LORD CAMPBELL, C. J. That section is not the limit of their jurisdiction.]

Sect. 58 gives jurisdiction to the county court in "all pleas of personal actions where the debt or damage claimed is not more than 20*l*." In Dwaris on Statutes, p. 674, 1st ed., p. 933, 2d ed., it is said, "The law does not favor a repeal by implication, unless the repugnance be quite plain," citing *Dr. Foster's case*, 11 Rep. 63 a.

[LORD CAMPBELL, C. J. Stat. 9 & 10 Vict. c. 95, is not a repealing act; it is a remedial act.]

In *Owens v. Breese*, in error, 6 Exch. 916; s. c. 4 Eng. Rep. 536, it was held that the county courts were not courts of record, to which a writ of trial under stat. 2 & 3 Will. 4, c. 42, s. 17, could not be directed.

[LORD CAMPBELL, C. J. A writ of trial could not be within the meaning of the legislature in passing stat. 9 & 10 Vict. c. 95, because there was no machinery for carrying it on.]

[He also cited *Williams v. Pritchard*, 4 T. R. 2.]

T. P. Thompson appeared to show cause in the first instance, but was not heard.

LORD CAMPBELL, C. J. The able argument of Mr. Pollock, and the

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authorities which he has cited, only confirm the impression of my mind at the commencement of his motion. By stat. 1 Vict. c. 33, an action of debt to recover this rate is given in "any of her majesty's courts of record at Westminster." Sect. 8 of the subsequent statute (9 & 10 Vict. c. 95,) gives to the county court jurisdiction "in all pleas of personal actions." This is a personal action, and the debt claimed is not above the specified amount. It comes within the general words of the enacting clause, and it is admitted that it does not come within the exceptions in the proviso. There is nothing to show that it was the intention of the legislature that the county court should not have jurisdiction over this cause of action; and it is much more for the convenience of the subject that for so small a demand he should have a remedy in the local court. An argument has been framed on the words "courts of record at Westminster;" but it would be strange to make a distinction between a cause of action given in these courts and a cause of action given in courts of record generally.

COLERIDGE, J. I agree with Mr. Pollock, that without the words in sect. 18 of stat. 1 Vict. c. 33, which give the alternative of an action or a distress, there would be no mode of recovering the rate in question by action. But that section gives a right of action, and when it is enforced it is a plea in a personal action. Sect. 58 of stat. 9 & 10 Vict. c. 95, gives jurisdiction to the county court over such an action; and there is a proviso specifically making some exceptions, all of which are common law proceedings, and they do not include this action. It is said that this is a specific right of action granted locally, from which it is inferred that it was intended to exclude all local jurisdiction; but that is a mere assumption. The argument on the other side might be, that the words "courts of record at Westminster," in sect. 18 of stat. 1 Vict. c. 33, were inserted because there was no local court at Birkenhead. Neither argument, however, is of much weight. We must be guided by the words of the statute.

WIGHTMAN, J. This is a question, not of right, but of remedy. The action would be for debt; and by sect. 58 of stat. 9 & 10 Vict. c. 95, for enlarging the jurisdiction of the county courts, all actions for debt which might be brought in the superior courts may be brought in the county court. This action cannot be excepted out of the general words of that section.

ERLE, J., concurred.

Rule refused.

Taylor v. Warrington.

BAIL COURT.

TAYLOR v. WARRINGTON.¹

• May 6, and November 22, 1852.

Distringas — Sheriff's Fees.

A levy having been made under a writ of *distringas*, the debt and costs were paid, when the sheriff refused to return the 40s. issues unless he was allowed "a discharge fee" of 4s. 6d.: —

Held, that the sheriff was not entitled to such fee.

THIS was a rule calling upon the defendant to show cause why a rule of this court should not be set aside, and why an order of Patterson, J., embodied therein, should not be rescinded. The plaintiff had commenced an action against the defendant, and a writ of *distringas* had been issued, under which a levy was made by the sheriff of Middlesex on the 5th August, 1851, the defendant paying the sheriff 40s. to prevent his goods being taken. Judgment in the action had gone by default, and subsequently the debt and costs were paid. The defendant then applied at the office of the sheriff of Middlesex for a return of the 40s., but he was told that he must obtain a judge's order. He accordingly, on the 3d December, 1851, obtained an order of Patterson, J., for payment of "the sum of 40s., debt and costs having been paid." This order was served at the sheriff's office, but payment of the 40s. was refused unless a sum of 4s. 6d. was allowed to the sheriff as "a discharge fee." The defendant refused to consent to this deduction, and the order was, on the 3d January last, made a rule of court, for the purpose of proceeding by attachment. There had been a change of sheriffs after the issues were levied. The above rule was then obtained.

D. D. Keane and *G. Francis* showed cause. The first objection that will be raised to this order is, that it was made upon the wrong sheriff, the writ of *distringas* having been executed by the late and not by the present sheriff. This turns upon the 3 & 4 Will. 4, c. 37, s. 7, by which it is enacted, that "every sheriff of any county shall, at the expiration of his office, make out and deliver to the new or incoming sheriff a true and correct list and account, under his hand, of all prisoners in his custody, and of all writs and other process in his hands not wholly executed by him, and shall thereupon turn over and transfer to the care and custody of the said incoming sheriff all such prisoners, writs, and process," &c. It cannot be said that this writ was wholly executed by the late sheriff. *Harrison v. Paynter*, 6 M. & W. 387, is distinguishable. There it was held that a writ of *feri facias* was wholly executed by the service and sale of the goods,

¹ 16 Jur. 1046.

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nothing remaining for the sheriff to do but pay over the proceeds to the plaintiff. But a writ of *distringas* could not be said to be wholly executed till its object, namely, the appearance of the defendant, was accomplished. The issues seized by the sheriff could not be handed over to any party without an order of the court; they were in *custodia legis*. Again: it was within the knowledge of the present sheriff whether this writ had been actually transferred or not; and yet, notwithstanding the under sheriff and his clerk have both made affidavits, there is no mention whatever of this fact.

[COLERIDGE, J. The statute says the sheriff is to transfer certain proceedings not wholly executed. Whether there has been an entire execution or not is an inference of law.]

In *Thomas v. Newnam*, 2 Dowl., N. S., 33, it was distinctly denied that the writ had been transferred. Secondly, the sheriff had no right to demand a discharge fee, as this was not one of the cases provided for in the table of fees, as settled pursuant to the 1 Vict. c. 55. The words were, "For any *supersedeas*, order, liberate, or discharge to any writ or process, or for the release of any defendant in custody, (unless in the prison of the county), or of goods taken in execution 4s. 6d." The writ of *distringas* does not come within either of these denominations, which comprise acts of a judicial nature. How could the sheriff discharge this writ? It should be shown that some service was done for which the fee was payable. Again; by the 4th section of stat. 10 Geo. 3, c. 50, (a statute which applies to all writs of *distringas*—see *Raban v. Plaiston*, 5 Burr. 2726), it was provided, that "when the purpose of the writ is answered, then the said issues shall be returned." The sheriff's duty, therefore, was to return these issues without any deduction.

Quain, in support of the rule. The defendant cannot have back these issues as a matter of right. The practice is laid down in 1 Arch. Prac. 182, where it is said that "the course is to apply to the court or a judge to have them back on paying the officer's fees." The court has power to put a defendant under terms when he applies to have the issues restored. *Cazelet v. Dubois*, 1 B. & P. 81. So, in *Martin v. Townsend*, 5 Burr. 2725, where rules had been obtained for selling the issues, the court would not discharge them except upon payment of the costs of the writs. The order in this case was obtained *ex parte*, and the sheriff had no opportunity of appearing before the learned judge who made it, and showing that he was entitled to the discharge fee. Had he done so, the order would not have been for the whole issues to be returned. 1 Tidd's Prac. 111; *Bound v. Vaughan*, 2 Chit. 36. *Harrison v. Paynter* is expressly in point, and shows that the order should have been made upon the late sheriff.

Cur. adv. vult.

Nov. 22.—CROMPTON, J., now read the following judgment of Coleridge, J. This was a case in which 40s. had been levied by the sheriff on a *distringas* to compel appearance; the defendant had

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subsequently appeared, and paid the debt and costs. An application had been made for the repayment of the 40s., and after some delays and a negotiation, the repayment was refused unless on a payment or deduction, by way of fee, of 4s. 6d. This was refused, and an order procured for the repayment of the 40s. The present rule was to set aside that order. It was said that the defendant's claim to have the money returned could not be supported under the 10 Geo. 3, c. 50, on which it was made. That statute, by sect. 3, after enacting that the court may order the issues levied, from time to time, to be sold, and the money arising thereby to be applied to pay such costs to the plaintiff as the court shall think just, under all the circumstances, to order, enacts that this surplus shall be retained until the defendant shall have appeared, or other purpose of the writ be answered; and sect. 4 provides that when the purpose of the writ is answered, then the said issues shall be returned, or, if sold, what shall remain of the money arising from such sale shall be repaid to the party distrained upon. The case of *Cazelet v. Dubois* was relied on as showing that the words of the 4th section must be understood with reference to the constant jurisdiction of the court; on which ground, in that case, where, a party having stood out, issue had been levied on several *distringases*, and then, having appeared, he had applied to have all the issues returned, the court would only order their return on payment of costs, undertakin to plead *instantly*, and take short notice of trial. That case differs much in its facts from the present, assuming it to have been rightly decided, and, at all events, could only be an authority for the court to exercise a discretion, which, in the case of an undoubted and satisfactory fee, it might exercise in favor of the sheriff. I am clearly of opinion that the purpose of the writ is answered when the defendant has appeared, although it has not been returned; and then it is the duty of the party who resists the plain words of the statute to satisfy the court clearly of the sheriff's right to the fee. Now, this fee is claimed, and can only be claimed, as authorized by the table prepared by the judges, under the authority of the 1 Vict. c. 55, s. 2; and in that table will be found a fee of 4s. 6d., allowed for any *supersedeas* writ of course, liberate, or discharge to any writ or process, or for the release of any defendant in custody, unless in the prison of the county, or of goods taken in execution." The release of issues appears to me neither a discharge to a writ or process, nor the release of goods taken in execution. The rule, therefore, will be discharged; and, as any attempt to set up an unauthorized fee ought to be checked, and this is, moreover, in opposition to the order of a learned judge, it must be discharged with costs.

Rule discharged, with costs.

AMIES & another v. KELSEY.¹

November 24 and 25, 1852.

Patent, Infringement of—Inspection of Machinery—15 & 16 Vict. c. 83, s. 42.

Under the 42d section of stat. 15 & 16 Vict. c. 83, which empowers a court of common law to order "an injunction, inspection, or account" in an action for the infringement of a patent, an inspection of machinery may be granted.

But such inspection will not be granted as of course, and without the party applying for it showing at least that it is material and really wanted for the purposes of the cause.

The application may be made before declaration.

THIS was a rule calling upon the defendant to show cause why the plaintiffs and their witnesses should not have an inspection of the machinery and apparatus employed by the defendant in the manufacture of braid, and which was alleged by the plaintiffs to be an infringement of their patent. The application was made under sect. 42 of the new Patent Law Amendment Act, 15 & 16 Vict. c. 83,² and was founded upon affidavits stating the title of the plaintiffs to the patent; the infringement by the defendant in making and selling a similar braid to that which was produced in court; the commencement of an action for such infringement; an application to inspect, and a refusal.

Hindmarch showed cause. The policy which dictated the enactment under which this application had been made was to place a court of common law in the same position as a court of equity, with regard to the inspection of machinery, and to enable complete justice to be done by one and the same tribunal. If this be so, is it not also to be intended that the power thus conferred upon a court of common law is to be exercised in a manner similar to that adopted in courts of equity? First, the plaintiffs have come prematurely, as no declaration has yet been delivered. In chancery there is always a bill on the file before the application is made.

[CROMPTON, J. Surely it is more convenient to have an inspection before the declaration is prepared. If it were granted after declaration, an amendment would be allowed, if necessary, and that would be only a roundabout way of obtaining what is now asked for.]

¹ 16 Jur. 1047.

² Sect. 42 enacts, that "in any action in any of her majesty's superior courts of record at Westminster and in Dublin, for the infringement of letters-patent, it shall be lawful for the court, in which such action is pending, if the court be then sitting, or if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant, respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit."

Secondly, there is no sufficient ground laid for the application. The plaintiffs say that the defendant has infringed their patent by manufacturing braid, and they produce some of the braid in court, so that they have all they want. It does not matter what machinery is used to produce the result, and therefore they cannot require an inspection.

[CROMPTON, J. They say they believe that you make the braid by their machinery, or by an equivalent.]

Webster, (who appeared in support of the rule), stated that the specification set out in the affidavits, showed that the patent was not only for the manufacture of the braid, but also for the machinery used for that purpose. Courts of equity are very careful how they grant this application; for it is extremely inconvenient to a manufacturer to have to expose his premises and machinery to the inspection of others. In chancery, after the bill is filed, notice of motion is given for an interlocutory injunction, and affidavits are used on both sides as to the novelty, &c., of the invention; and then the court have the materials before them whereon to decide.

[CROMPTON, J. How can I go into the question of infringement or no infringement upon affidavits?]

There should be a *prima facie* case. There are not above three or four instances in which such inspection has been granted in chancery. They are all collected in Webster's Patent Cases. Under the new Evidence Act, courts of common law require strong and clear grounds to be laid before them before they grant an inspection of documents. *Pepper v. Chambers*, 16 Jur. 19; s. c. 7 Eng. Rep. 589. Here there is no allegation that the plaintiffs cannot safely proceed to trial without an inspection. Then does the word "inspection" in the act apply to machinery? The chief reason for supposing that it does is, that it is found in company with "injunction" and "account," which were its associates in chancery.

[CROMPTON, J. I think the act extends to an inspection of machinery.]

Webster, in support of the rule. The 41st and 42d sections of the act show the necessity of making this application, and the propriety of making it at this time. By sect. 41 a plaintiff is to deliver particulars of breaches with his declaration. In *Hindmarch on Patents*, 347, it is said, "When the plaintiff is unable to obtain clear and satisfactory proof, without inspection of the defendant's machinery or premises, the court will order an inspection by proper persons, to be named in the order."

[CROMPTON, J. What part of your affidavit shows that you cannot obtain clear and satisfactory proof without inspection? I quite agree in thinking that this is no light matter which you request.]

There is no such distinct allegation, but it may be inferred from what we state as to the nature of the patent. If inspection be not granted, our particulars of breaches will be wider, and the expense of witnesses greater, than they would otherwise be. The other side

does not make any affidavit of merits, or state any difficulty in the way of an inspection.

Hindmarch said that he was willing to admit an infringement by sale of the braid.

Cur. adv. vult.

Nov. 25. CROMPTON, J. This was an application under the 42d section of the new Patent Act, 15 & 16 Vict. c. 83, for an inspection by the plaintiffs and their witnesses of the machinery and apparatus employed by the defendant in the manufacture alleged to be an infringement of the plaintiffs' patent. The motion was founded on affidavits of the title of the plaintiffs to the patent, of the infringement by the defendant in making and selling a similar article to that produced by the plaintiffs, of the buying the article, and of an application and refusal to be allowed to inspect. Two objections were made by Mr. Hindmarch on the part of the defendant. It was said, in the first place, that the application was premature, the plaintiffs not having yet declared. I see no reason for limiting an inspection, under the statute, to the period of the declaration. There is no such limitation in the enactment, which is general, and applicable wherever an action is pending; and an inspection may frequently be desirable or necessary for the purposes of declaring. It was said, in the second place, that no case for an inspection is made out on these affidavits. It was agreed by both sides that the object of the statute is to enable the court of law to give such an inspection of the machinery as a court of equity would give; and it was urged for the defendant that it was by no means of course in equity to grant an inspection. On the part of the plaintiffs, Mr. Webster cited the passage from Mr. Hindmarch's book, where it is said that "where there is strong *prima facie* evidence that the defendant is infringing, and the plaintiff is unable to obtain clear and satisfactory proof without inspection of the defendant's machinery or premises, the court will order an inspection by proper persons, to be named in the order." It was stated that the instances of courts of equity interfering by ordering an inspection were by no means of every day occurrence. It is not necessary, however, in the present case, to consider what a court of equity would do in such cases, nor how far this court is to be guided in granting inspection under the new statute by what would be done in equity, nor to consider what case the party applying for such inspection must make out; because I think — and I am strengthened in that opinion by the passage cited — that an inspection ought not to be granted entirely as of course, and without the party applying for it showing, at least, that it is material and really wanted for the purposes of the cause. On these affidavits there is no suggestion of the information to be gained by an inspection being necessary, material, or even desirable, or of its being really wanted. As the plaintiffs may be able, either now, or at a subsequent stage of the case, to supply these defects, or to make a case entitling them to the inspection prayed, and as this is the first discussion on the subject, I

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think that the rule should be discharged, without prejudice to the plaintiffs renewing their application on amended affidavits.

Rule discharged.

REGINA v. STREET.¹

May 29, 1852.

Audit of Overseers' Accounts — Stat. 7 & 8 Vict. c. 101, s. 35 — Costs of Litigation — Sanction of Vestry.

The auditor of the accounts of overseers disallowed a sum which was part of the costs of defending an appeal by a railway company against a poor-rate to which the company were assessed, and stated the following reasons for his disallowance: — "First, that the overseers ought, prior to incurring those expenses, to have summoned a vestry and taken the opinion of the inhabitants as to the propriety of doing so. Secondly, that after the quarter sessions had reduced the assessment, subject to a case, the overseers ought to have summoned a vestry and taken the opinion of the inhabitants on the propriety of proceeding with the case." On the bringing up of the disallowance of the auditor, under sect. 35 of stat. 7 & 8 Vict. c. 101: —

Held, that the overseers having acted *bonâ fide*, and not improvidently, both in contesting the appeal and in abandoning the case reserved, the disallowance was wrong.

RULE calling upon the auditor of a poor-law audit district, formed under sect. 32 of stat. 7 & 8 Vict. c. 101, which included the parish of Ringwood, in Hampshire, to show cause why the disallowance in the account of the overseers of the poor of Ringwood for the year 1848, by the auditor of the said district, of the sum of 73*l.*, should not be quashed. The sum of 73*l.* was part of the costs of defending an appeal by a railway company against a poor-rate to which the company were assessed. A *certiorari* having been issued to the auditor, under sect. 35 of stat. 7 & 8 Vict. c. 101, to state his reasons for disallowing that sum, he stated the following: — First, that the overseers ought, prior to incurring any of those expenses, to have summoned a vestry and taken the opinion of the inhabitants as to the propriety of doing so. Secondly, that after the Court of Quarter Sessions had reduced the assessment, subject to a case for the opinion of the Court of Queen's Bench, the overseers ought, as soon as practicable, to have summoned a vestry and taken the opinion of the inhabitants on the propriety of proceeding with the case reserved, and as to the amount at which the company should be assessed. It appeared from the affidavits, that in July, 1847, before the overseers, whose accounts were in question, came into office, a vestry meeting was held for the purpose of considering the dispute which had then

¹ 16 Jur. 1085.

arisen between the railway company and the parish, and at that vestry meeting it was resolved to rate the company at 416*l.* per mile, making the sum at which they were rated 2,708*l.* In December following, application was made by the then overseers to the poor-law board for information as to the mode in which they should assess the railway company, but the poor-law board declined to give the required information, and referred the parish officers to the proper tribunal for deciding those questions. On the 24th December, another vestry was summoned, and at that meeting it was resolved, that, unless the company would consent to be assessed at 2,000*l.*, the overseers should take proceedings to enforce a rate at that amount. In the rates made in 1848, by the overseers for that year, whose accounts were in question, the company were accordingly assessed at that amount, and against those rates the company appealed. The quarter sessions reduced the ratable value of the railway from 2,000*l.* to 300*l.*, subject to a case for the opinion of the Court of Queen's Bench; but that case was not proceeded with, it being ultimately agreed between the overseers and the railway company, that the company should be assessed at 450*l.* ratable value, and the rate be altered accordingly. After the audit, which was concluded in June, 1849, a vestry meeting was called, and the expenses in question were sanctioned by the inhabitants.

Collier showed cause. Parish officers are not entitled to the costs of contesting an appeal, unless they consult the vestry and obtain their concurrence.

[COLERIDGE, J. The cases in which it has been held, that if the costs were improvidently incurred by the overseers, they would not be allowed, are against you. The overseers may make a rate without the vestry, and in this they differ from the churchwardens in the case of a church-rate.]

In *Regina v. Fouch*, 2 Q. B. 308, it was held, that the special sessions had acted rightly in disallowing the costs of contesting an appeal against a rate which was indefensible.

[CROMPTON, J. In that case it must be taken that the justices thought that the proceedings of the overseers were wrong: here the auditor in effect says, that however right the overseers were, they ought to have summoned a vestry and obtained their consent.

COLERIDGE, J. The difference in the amount is nothing.]

In *Regina v. The Great Western Railway Company, in re Burnham Rates*, 13 Q. B. 327; 13 Jur. 652, it was held, that the costs of a litigation in support of rates irregularly made, which in the opinion of the court was unnecessary and improper, ought not to be allowed to the overseers, although they were incurred *bonâ fide*, under the advice of counsel, with the sanction of the vestry.

[He also cited *Rex v. Gwyer*, 2 Ad. & El. 216.]

Polden, contra, was not heard.

COLERIDGE, J.¹ Under stat. 7 & 8 Vict. c. 101, which directs the audit of the accounts of the overseers, any party has, under sect. 35, a right to call upon the auditor to state his reasons for allowing or disallowing any items, and the question on the bringing up of the allowance or disallowance by writ of *certiorari*, under sect. 35, is as to the validity of the reasons assigned by him; what may be said either on the right hand or on the left hand of that question is not to be regarded.

In this case the auditor states two grounds. The first is, that prior to incurring any of the costs in question, the overseers ought to have called a vestry meeting, and taken the opinion of the inhabitants. There is not a word expressing an opinion that what they did was improper or wrong, and we are not to presume against them. The simple question is, whether the parish officers must in all cases go through the form of calling a vestry to sanction them in defending an appeal against a rate, and whether, if they do not, though they have acted prudently in the matter, they are not to receive from the parish those expenses which cannot be obtained from the appellants if the sessions do not give full costs. No case has gone that length, and it is obvious that many circumstances may exist to render such a course unnecessary.

[His lordship stated the facts.]

The auditor was not satisfied that the parish had changed its mind since the resolution in the vestry that the company should be assessed at 2,000*l.*, which was not an arbitrary sum, but calculated at so much per mile, and that unless they would consent to that, the overseers should take proceedings to enforce a rate at that amount. When these overseers came into office the matter had been sifted, and their line of conduct had been chalked out by the vestry; and in this state of things there is good reason for believing that the calling another meeting would have been a mere formal proceeding. Therefore, I am of opinion that there was no such misconduct in the overseers before they defended the appeal as should deprive them of costs; and therefore the first ground of disallowance fails.

As to the second ground of disallowance. The quarter sessions reduced the rate, subject to a case for the opinion of this court. After that the overseers do not blindly incur further expense in litigation, but negotiate with the company, and succeed in getting the rate raised from 300*l.* to 450*l.* Then it is said that there was a wanton abandonment of the case which had been reserved, or at any rate that they should have obtained the sanction of the vestry before they abandoned it; but it is not pretended that they acted *malâ fide* or improvidently in compromising the case.

The cases cited are distinguishable. *Regina v. Fouch*, 2 Q. B. 308, was decided on a different act of parliament, stat. 4 & 5 Will. 4, c. 76, s. 47, and the court thought that there was actual misconduct in the overseers in defending the appeal. In *Regina v. The Great Western*

¹ LORD CAMPBELL, C. J., and ERLE, J., were in the Court of Criminal Appeal.

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Railway Company, in re Burnham Rates, 13 Q. B. 327; 13 Jur. 652, informal rates, having been made and appealed against, were quashed on a friendly appeal, which the court does not approve, and the new rates made in lieu thereof, were appealed against, and the order of sessions confirming them was quashed by this court.

CROMPTON, J. As to the first reason assigned by the auditor, no authority or statute has been cited to show that the fact of the overseers not consulting the vestry before defending an appeal against a rate, is a ground for disallowing the costs of the appeal. It is, indeed, better, as a matter of safety, that they should do so. Here they knew what the mind of the vestry was. The second reason is worse than the first.

Rule absolute.

COUNTY COURT APPEAL.

ROOKE & another v. THE MIDLAND RAILWAY COMPANY.¹

December 1, 1852.

Trover — Railway Company, Conversion by.

The plaintiffs intrust goods to the Y. and N. M. Railway Company to be conveyed from H. to N. The goods arrive at N., the defendants' station, by the A. Railway, belonging to an intermediate company. The plaintiffs demand them of the defendants, offering to pay any charges or lien, but the defendants refuse to deliver them up, upon the ground that by an agreement with the A. company, the latter had no right to bring such goods to the defendants' station, and insist upon their being taken back to the A. line:—

Held, that the defendants were liable in trover for the goods; that the detention of them by the defendants, after a demand made upon their station-master, was sufficient evidence of a conversion; and that the plaintiffs were entitled to have their goods, though brought by mistake or without right on the premises of the defendants.

Scold, it was unnecessary for the plaintiffs to show, when they demanded the goods, that they had paid all charges of the other companies, or to produce an authority from those companies for the delivery of the goods.

THIS was an action of trover, tried in the county court of Nottinghamshire, holden at Nottingham. The plaintiffs, who resided and carried on the business of joiners at Nottingham, purchased some timber at Hull, and it was delivered, by their direction, to the York and North Midland Railway Company, to be forwarded to the plaintiffs. At the trial, the timber was proved to be in the possession of the defendants, at their station at Nottingham, but no evidence was given to show how it came there. The following letter, however, from the agent and general goods manager of the defendants, addressed to the secretary of the Ambergate, Nottingham, and Boston and Eastern Junction Railway Company, respecting the timber, was produced by the plaintiffs:—

¹ 16 Jur. 1069. Coram COLERIDGE, and ERLE, JJ.

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"Midland Railway, Nottingham.

"Sir, — I have to inform you that the understated goods have arrived at this station by your line, and not being included in the agreement under which the use of this station is to be afforded to your company in regard to the traffic of the line, this company cannot undertake the delivery thereof, and I am instructed, therefore, to require that the said goods shall be taken back again.

"JOHN ASHWORTH."

[Here followed a list of the goods in question.]

Several attempts were made by the plaintiffs to obtain the timber from the Nottingham station; and ultimately a written demand was served upon the defendants, stating that the plaintiffs were ready and willing to pay any lawful lien or claim the defendants might have upon the timber for carriage or otherwise. The plaintiffs attended at the Nottingham station, pursuant to their written demand, to receive the timber and to learn the amount of the charges, when they were referred by the station-master to one M'Craith, another servant of the defendants. A demand of the timber was then made upon M'Craith, the plaintiffs stating their willingness both to him and the station-master to pay any charges the defendants might have upon the timber. Some of the timber was taken by the plaintiffs' servant out of the warehouse of the defendants, for the purpose of being conveyed away, when, by the direction of M'Craith, other servants of the defendants carried the timber so removed back again into the defendants' warehouse, M'Craith stating that he was ordered by Ashworth (the agent and goods manager above referred to) not to let the timber go, and that they could only have it by taking the same back again to the first station on the Ambergate line of railway, a distance of five miles from the defendants' station at Nottingham. At the trial, it was contended by the defendants' counsel that the plaintiffs must be nonsuited, as there was no evidence of a conversion; that the refusals given to the demands at the Nottingham station were not such refusals as were even evidence of a conversion. The judge overruled these objections, stating that he considered there was evidence of a conversion, and gave judgment for the plaintiffs. Against this judgment the defendants appealed.

Mellor, (with him *Giffard*), for the appellants. First, the refusal to deliver up the goods was a qualified refusal, and one that was reasonable under the circumstances; it did not, therefore, amount to evidence of a conversion. It must be assumed from the case, that these goods, having been originally sent by the York and North Midland Railway, came on the Ambergate line, and by the latter were sent on the Midland Railway to Nottingham.

[COLERIDGE, J. Suppose the goods were trespassing on the defendants' station; the plaintiffs say they are willing to pay the amount of any lien upon them; are they not entitled to have them?]

The Midland Railway Company may have no lien on them, and yet not be entitled to deliver them, as the other companies over whose

lines they had passed might have charges for the conveyance. The plaintiffs should have produced an authority from the other companies for the delivery of the goods. Secondly, there is no evidence of a conversion by the defendants. It was the duty of the plaintiffs to have gone to Ashworth, the goods manager, and made the demand upon him.

[COLERIDGE, J. There was a written demand made on the company themselves.]

Yes, but not served upon the manager, who is the only person who could make the company responsible. There is merely a demand and refusal, but it does not appear that the company set up any title in themselves; they merely deprive the plaintiffs of the goods for a temporary purpose. The mere statement of M'Craith is no evidence against the company, as it does not appear he had the authority of the company for refusing to deliver the timber. *Porthonia v. Dawson*, Holt, 383. In *Glover v. The London and North Western Railway Company*, 5 Exch. 66, it was held that a director himself could not bind the company. *Smith v. The Birmingham Gas Company*, 1 Ad. & El. 526.

[COLERIDGE, J. In this case the company have kept the articles.]

There is no evidence that M'Craith was authorized by the company to bind them, so as to render them liable in this action. This was not a tortious refusal. Thirdly, the plaintiffs have not shown that they were entitled then and there to the goods.

Willes, for the respondents, was not called upon.

COLERIDGE, J. This judgment must be affirmed. There is abundant evidence of a conversion. It is no answer to this action to say that there must be a conversion by somebody to his own use. Here was clearly a detention of the plaintiffs' goods for the purposes of the party detaining them. A demand certainly is not conclusive, as it may be surrounded by circumstances which might justify the refusal, and therefore not amount to a conversion. But here, in consequence of some breach of an agreement between themselves and somebody else, the defendants choose to detain the plaintiffs' goods. The detention was proved, and that in itself is evidence of a conversion. Moreover, the plaintiffs tender to the station-master the amount of any damages the company may have sustained, or of charges they may have in respect of the goods. What can affect them if this will not do it? The plaintiffs go to the station-master, and if anybody was to bind the company, surely he was. The station-master refers them to M'Craith, and therefore, for this purpose, M'Craith would be in the same position as the station-master, and plainly bound the defendants by his refusal, and moreover by his act of taking the goods back again from the possession of the plaintiffs.

ERLE, J. When the goods arrived at Nottingham the plaintiffs were entitled to have the goods delivered to them; they demanded them, and they were refused. This was a conversion, unless the de-

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fendants can justify their refusal. They say, "The goods were brought to our station by the Ambergate Railway Company—an intermediate line, which has no right to send such goods to our station;" and they, therefore, insist that the Ambergate Railway should take them back to the part which belongs to that company. The plaintiffs clearly have a right to have their goods, though brought by mistake, or without right, on the defendants' premises, upon their paying any charges they may have against them in respect of them.

Judgment affirmed, with costs.

BAIL COURT.

REGINA V. THE JUSTICES OF DERBYSHIRE.¹

November 22 and 25, 1852.

Quarter Sessions — Rules of Practice — Discretion of Justices — Mandamus.

The discretion of justices in enforcing a rule of sessions, which is not invalid or unreasonable, will not be interfered with.

The sessions of D. had, as it was alleged, a rule by which appeals could not be entered after the day preceding the first day of the sessions, except by leave of the court. G. had given the necessary notices, but had not entered his appeal in accordance with the above rule. On the first day of the sessions a special application was made to the court to allow him to enter the appeal, which was refused:—

Held, that although the court would not interfere with the discretion of the sessions where a distinct rule of practice was shown to exist, yet, as it did not distinctly appear upon the affidavits what the rule of practice really was, or how far it had been acted upon, a *mandamus* might go.

A RULE had been obtained calling upon the justices of Derbyshire to show cause why a *mandamus* should not issue commanding them to hear an appeal against a conviction. James Green had been convicted under the 5 Geo. 4, c. 83, (the Vagrant Act), and against this conviction he had given the necessary notices, and had entered into the usual recognizances for prosecuting an appeal. The sessions began upon Tuesday, the 19th October, but it was the practice of the sessions to transact only certain county business on the first day, and to adjourn the general business to the second day, Wednesday. On the morning of the latter day the appellant's attorney applied to the clerk of the peace to enter the appeal; but he was told, that according to the rule of the sessions, the appeal should have been entered on the previous day. A special application was made to the court to

¹ 16 Jur. 1071. *Coram* CROMPTON, J.

allow the appeal to be entered, but they refused to interfere, and the appeal was consequently not heard. The appellant had been sentenced to three months' imprisonment.

Boden showed cause. The court will not interfere with the sessions in carrying out their rules of practice. In *Rex v. The Justices of Wiltshire*, 10 East, 404, the rule of practice upon which the justices acted in refusing to hear the adjourned appeal had been made only two sessions before, and then first acted upon, and was not known to the appellant's attorney. But here the rule was made in 1830, and although the appellant's attorney had sworn that he was unacquainted with the rule, yet if he had taken the trouble of referring to the advertisements in the county papers he might have seen what was the practice of the sessions. In *Rex v. The Justices of Lancashire*, 7 B. & Cr. 691, the circumstances were the same as those of *Rex v. The Justices of Wiltshire*. In *Regina v. The Justices of Surrey*, 3 New Sess. Cas. 531, the court interfered, but only upon the ground that the sessions had made a rule requiring conditions distinct from and in addition to the steps required by law. In *Regina v. The Justices of Monmouthshire*, 3 Dowl. 310, Patterson, J., said, "If the court in the case of *Rex v. The Justices of Wiltshire* means only that we might interfere where there is no rule, it is quite right; if it means that we are to interfere in all cases where there is an existing rule, I should have considerable doubt." The sessions had a perfect right to make this rule; and so far from its being unreasonable, so as to make it an illegal rule, it appears from the affidavit that it was quite reasonable. This court will not interfere with the discretionary power of the sessions. *Rex v. The Justices of the West Riding of Yorkshire*, 5 B. & Ad. 667.

Huddleston, in support of the rule. *Regina v. The Justices of Monmouthshire* and *Regina v. The Justices of Montgomeryshire*, 2 New Sess. Cas. 78, are cases in which the rule of practice was one in reference to the adjournment of an appeal; and there was nothing so peculiar in those cases as to induce the court to interfere. The rule of the sessions is one which cannot be supported.

[CROMPTON, J. Can you show me that I have the power to interfere with the mode in which the justices have exercised their discretion?]

In *Rex v. The Justices of Wiltshire*, Lord Ellenborough said, "The magistrates certainly had a discretion to exercise, but we have also a kind of visitatorial jurisdiction over them."

[CROMPTON, J. Where there is a discretion in the court below, they ought to decide whether they will exercise it.]

There may be rules which, though reasonable and legal in themselves, become illegal and unreasonable when applied to particular cases.

[CROMPTON, J. The sessions can surely make some order with respect to entering appeals. It is like the entering records at *Nisi Prius*.]

By the statute itself, they are "to hear and determine" the matter

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of such appeal. [He also cited *Regina v. The Justices of the West Riding of Yorkshire*, 2 Q. B. 705; *Regina v. The Justices of Merionethshire*, 1 New Sess. Cas. 277; and *Regina v. The Justices of Glamorganshire*, 4 New Sess. Cas. 110.

Cur. adv. vult.

Nov. 25. CROMPTON, J. This is certainly a case of very considerable hardship. The applicant had given the proper notice of appeal, had entered into the necessary recognizances, and attended the sessions. The usage of the sessions was for the magistrates to meet on the Tuesday and transact some magisterial and other business, and then adjourn the general business of the sessions to the next day. The parties were bound over, and ordered to attend on the Wednesday. This circumstance may have misled the appellant. He, however, appeared in court with his attorney, (who also appears to have been ignorant of the usage of the sessions), and was then told by the clerk of the peace that he could not be allowed to enter his appeal, except by a special application to the court. He made a special application, which the court refused. I can hardly imagine a case in which the magistrates could be more clearly called on to relax their rule than the present, and I cannot but say that the discretion of the magistrates was improperly exercised. But still we must be guided by general rules. It was argued that this court has a discretionary power over the discretionary power of the sessions, and the case of *Rex v. The Justices of Wiltshire* was cited, in which Lord Ellenborough says that this court has a visitatorial power over the sessions. It appears to me very questionable indeed whether these cases go to the extent of saying that we can interfere with the discretionary power of the sessions, and they are much qualified by what fell from Parke, B., in *Rex v. The Justices of the West Riding of Yorkshire*, 5 B. & Ad. 667; he disapproved, during the argument, of the language held in the case of *Rex v. The Justices of Wiltshire*, and in his judgment said, "We have no right to interfere with the discretionary power of the sessions; where they have that power their discretion is to be confided in." I entirely concur in this language, and, upon the question as to whether we should interfere with the discretion of the sessions, I feel myself obliged to say that we cannot act upon those old cases. Where the rule of a sessions is not invalid or unreasonable, and is acted upon by the sessions, a court of law ought not to interfere. But, however, in the present case the affidavits are so very indistinct that I entertain considerable doubt what the practice really was, and how far the sessions acted upon it, so as to make out a case that there is a distinct rule of practice. There appears, therefore, to be sufficient reasons for this writ to go; but if on the return it should appear that it was purely a matter of discretion with the justices, and that they exercised that discretion, the peremptory writ ought not to go. I think it very desirable that, as there are contradictory decisions, the matter should be brought before the full court. I am, however, clearly of opinion that where the sessions have a discretionary power we ought not to interfere, and that

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such interference would be most dangerous, and unfounded in point of law; but in the present case there is sufficient doubt upon the affidavits to admit of the writ going.

Rule absolute.

COUNTY COURT APPEAL.

WILDES v. MORRIS.¹

December 1, 1852.

Clerk of the Peace — Sheriff — Levying of Fines — 59 Geo. 3, c. 28 — 3 Geo. 4, c. 46.

By the 3 Geo. 4, c. 46, s. 2, fines imposed at quarter sessions are to be inserted on the roll by the clerk of the peace, and a copy thereof, together with a writ of *distringas* and *capias*, is to be sent by him within twenty-one days to the sheriff, which is to be the sheriff's authority for levying such fines. By sect. 3, the clerk of the peace, before sending the roll to the sheriff, is to make oath that the roll is truly made up, and that the fines are, to the best of his knowledge, inserted therein, and that all fines paid to or received by him are inserted therein, without any wilful omission:—

Held, that on such roll and writ being sent to the sheriff, his duty is not merely ministerial; but that, if he has received the fine, he must not proceed to levy it, although it may appear upon the roll to be unpaid.

Held, also, that if the clerk of the peace has received the fine, he must enter it upon the roll as paid; and that if the sheriff has received it, and that fact is known to the clerk of the peace, he may enter it upon the roll as paid; but *quære*, in this latter case, if he is bound so to enter it?

By the 59 Geo. 3, c. 28, two courts may be held at quarter sessions, and the clerk of the peace is to appoint a fit and sufficient person to record the proceedings in the second court, and such proceedings are to be delivered over to the clerk of the peace, and to be equally deemed a part of the records as if recorded by the clerk of the peace himself, and the justices may make an order on the treasurer to pay to the clerk of the peace such sum as they shall deem a reasonable remuneration to the clerk for such purpose.

Quære, whether the person so appointed is the servant of the clerk of the peace, so as to render the latter liable for the negligence of the former, or so as to make a receipt by such person, of a fine imposed at quarter sessions, a receipt by the clerk of the peace?

Quære also, if such person has authority to receive fines imposed at quarter sessions, so as thereby to charge the clerk of the peace with the receipt of them?

Where such person had received in court a fine so imposed, and had handed it over to the undersheriff, but made no record of such payment, and the clerk of the peace, not knowing that such payment had been made, inserted the fine on the roll as unpaid, and the sheriff thereupon levied the fine:—

Held, that the clerk of the peace was not bound to enter the fine as paid unless his appointee was his servant, acting within his authority.

Held, also, that the sheriff ought not to have levied the fine; and, per ERLE, J., that he was responsible to the party levied upon for having done so.

THIS was an action tried at the County Court of Kent, holden at Maidstone, before the judge of the court and a jury. The particulars

¹ 16 Jur. 1115; 22 Law J. Rep. (N. S.) M. C. 4. *Coram* COLERIDGE and ERLE, JJ.
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of the plaintiff's demand annexed to his plaint were as follows:— "In the County Court of Kent, at Maidstone. Between William Morris, plaintiff, and Henry Atkinson Wildes, deputy clerk of the peace for the county of Kent, defendant. The plaintiff claims of the defendant the sum of 50*l.* for damages; for that at the general quarter sessions of the peace for the western division of the county of Kent, held at Maidstone, on the 6th January, 1852, certain justices, forming a sufficient quorum, sat apart in a second court for the transaction of the business of the sessions: that the plaintiff was then and there convicted of two several assaults, and, being so convicted, was ordered by the said justices to pay two certain fines, to wit, 4*l.* and 2*l.*, which fines the said plaintiff then and there paid to a certain Henry Dudlow Wildes, then sitting in such second court aforesaid, as assistant deputy clerk of the peace, having been appointed by the defendant as a fit and sufficient person to record the proceedings taken by and before the said justices so sitting apart; and the said Henry Dudlow Wildes, then and there so carelessly and negligently recorded the said proceedings, that he omitted to record the payment of the said fines by the plaintiff, and in consequence of such carelessness and negligence, when the roll of fines, americiaments, and recognizances of the said quarter sessions, directed by law to be made up by the clerk of the peace, was made up by and under the direction of the defendant, the name of the plaintiff was inserted in the list of the persons in the said roll liable to be levied upon, and to pay fines, &c., though his name ought to have been in the list of persons in the roll contained that are expressed as having paid their fines, &c.; and the defendant then, as by law directed, sent a copy of the said roll, with the proper writ attached thereto, to the sheriff of the said county; and the sheriff then, after the premises, and by reason thereof, arrested the said plaintiff, and imprisoned him; and the plaintiff says, that his arrest and imprisonment arose from the negligence of the defendant, through and by the aforesaid negligence of his said appointed assistant and servant, and the plaintiff suffered great shame and distress of mind, &c., to his damage of 50*l.*" The facts which were proved or admitted were, that the plaintiff was indicted at the January quarter sessions for the county of Kent, at Maidstone, for two assaults in 1852. He was tried in a second court, constituted under the 59 Geo. 3, c. 28, and 5 & 6 Vict. c. 38, s. 4, in which court Mr. Henry Dudlow Wildes, a solicitor and partner in business with the defendant, who is a solicitor, and the deputy clerk of the peace for the county of Kent, recorded the proceedings, the said H. D. Wildes having been duly appointed for that purpose, under the first of the above-mentioned statutes, by the defendant. The plaintiff was found guilty of the assaults, and was adjudged to pay two several fines, and to be imprisoned until the fines were paid. The fines were immediately paid by the attorney of the plaintiff, and while the plaintiff still remained in the dock, to H. D. Wildes. The plaintiff was thereupon discharged, and H. D. Wildes, in the course of five minutes, paid in court the identical moneys received from the plaintiff, to the undersheriff of the county, who was in attendance as under-

sheriff at the quarter sessions. H. D. Wildes made no minute or memorandum in the session books or elsewhere, or otherwise recorded the receipt of the moneys, nor took or received any receipt for the same from the undersheriff. The defendant, subsequently to the quarter sessions, and in pursuance of the stat. 3 Geo. 4, c. 46, sent a copy of the roll, in the 2d section of that statute mentioned, together with a writ of *distringas* and *capias* thereto annexed, to the sheriff of the county. The plaintiff's name appeared upon the copy so sent, with the sums of 4*l.* and 2*l.* respectively against it, and such sums appeared thereon as still due from the plaintiff, the said roll containing no entry of the payment of those sums, or either of them. The plaintiff was afterwards taken into custody by an officer of the sheriff of Kent, the sheriff having issued his warrant to take the plaintiff upon the authority of the copy roll, with the process annexed, so sent to him by the defendant. The plaintiff, upon his arrest, gave security for his appearance at the next quarter sessions, and was discharged from custody. He appeared at those sessions, and, on explanation of the circumstances to the undersheriff, was by him discharged. The plaintiff brought his action against the defendant for this alleged breach of duty. The defendant, at the close of the plaintiff's case, submitted to the learned judge, that the facts disclosed no cause of action on the part of the plaintiff against the defendant, and requested the learned judge to nonsuit the plaintiff, or direct the jury to find a verdict for the defendant—first, because H. D. Wildes, was not, in law, the assistant and servant of the defendant, as alleged in the plaintiff's particulars, and the defendant was not, therefore, answerable for his acts or omissions; secondly, because, if the defendant could be held answerable for the acts or omissions of H. D. Wildes, the defendant could not be responsible for not receiving, or not entering upon the roll the payment of the sums of 4*l.* and 2*l.*, as H. D. Wildes was not authorized to receive the same; thirdly, because it was not the duty of the defendant, as deputy clerk of the peace, to have inserted in the roll required to be made up by him, under the 3 Geo. 4, c. 46, ss. 2, 3, the payment of the fines by the plaintiff, as the same were not paid to, or received by, or ever came to the hands of the defendant, but immediately upon their receipt by H. D. Wildes, were by him handed over to the undersheriff. The learned judge refused to nonsuit the plaintiff, but decided, as to the first point, that according to the 59 Geo. 3, c. 28, and 5 & 6 Vict. c. 38, s. 4, the defendant was clearly responsible for the acts and omissions of the officer appointed by him, and acting in the second court; and as to the second point, that even if that were not so, and it was no part of the duty of the clerk of the peace, or his deputy, to receive the fines, still, as he had in fact received them, it was no answer from him to the plaintiff, to say that he ought not to have received them, and, as to the third point, that as the roll was made up by the defendant himself, and sent by him to the sheriff, with a writ and an oath indorsed on the back of it in a particular form, which the learned judge read, it was for the jury to consider whether the defendant had not been guilty of an omission in not taking care that the roll was

correctly made up in every particular, because the sheriff, as a ministerial officer, was bound to act upon that roll. The learned judge left the facts for the consideration of the jury, who found a verdict for the plaintiff, with 10*l.* damages. The questions for the consideration of the court were, whether the ruling of the learned judge on the several points above mentioned was correct or not; and whether the learned judge, under the circumstances, was or was not justified in leaving the facts proved to the consideration of the jury.

Deedes, for the appellant. The ruling of the judge was incorrect. First, the appellant, who is deputy clerk of the peace for the county of Kent, is not responsible for any acts of the gentleman appointed by him for the second court at the sessions. The relationship of master and servant does not exist. The stat. 59 Geo. 3, c. 28, is the first statute which relates to the second court at sessions. By sect. 3, "the clerk of the peace, or his deputy, (wherever two or more justices shall sit apart at any quarter sessions), shall be authorized and required to appoint a fit and sufficient person to record the proceedings so had before the justices sitting apart, and such proceedings shall be delivered over to the clerk of the peace or his deputy, and shall be equally deemed to be a part of the records of such sessions as if the same proceedings had been recorded by the clerk of the peace himself; and it shall be lawful for the justices assembled at the quarter sessions to make an order upon the treasurer of the county to pay to the clerk of the peace such sum or sums of money as they shall deem a fit and reasonable remuneration to the clerk of the peace for such purpose as aforesaid. The 5 & 6 Vict. c. 38, s. 4, also refers to such second court of quarter sessions. There is no complaint that the person appointed was not fit or sufficient. A clerk of the peace might be liable if his appointee was unfit. That part of the section which states that the proceedings recorded by this person are to be the same as if recorded by the clerk of the peace himself, means that when handed over to the clerk of the peace they are to become part of the records of the court.

[COLERIDGE, J. The clerk of the peace receives the remuneration, and might pay less to the assistant than he himself receives.]

The clerk of the peace is the only officer known to the justices at sessions, and therefore the remuneration is to be paid to him. If the view of the judge be correct, then, although the clerk of the peace has appointed a fit person, he may be liable to any extent for his acts or omissions, and this although they perform their functions in different courts, without opportunity of superintendence or control. If any one is liable it is the appointee himself. This is not like the case of a sheriff, who is liable for the acts of the undersheriff and bailiffs, because that proceeds on the ground that they are one person; *Cameron v. Reynolds*, Cowp. 403; and even the sheriff is not liable in all cases, as where a bailiff acts upon the suggestion of a third party. *Cook v. Palmer*, 6 B. & Cr. 739; *Crowder v. Long*, 8 B. & Cr. 598. Secondly, the duty of the appointee was simply to record the proceedings, and

not to go beyond the sentence — that is, the imposition of the fine; he had nothing to do with the payment of it.

[COLERIDGE, J. Is not the act complained of, the act of the clerk of the peace himself, in afterwards making up the record without inserting this payment? This omission may have been in consequence of the act of the appointee, but the statute requires the clerk of the peace to make the entry.]

As soon as the fine is imposed the court has done with the case, and the sheriff then steps in for the recovery of the fine. The payment might have been made months after the fine was imposed. The appointee here received it as agent of the undersheriff, as the gaoler would have received it. It is the duty of the sheriff or his deputy, to attend the quarter sessions for the purpose of receiving fines. Dalton's Country Justice, tit. "Sessions," (3), p. 458; 5 Burn's Justice, "Sheriff." Thirdly, as to the making up of the roll. The stat. 3 Geo. 4, c. 46, s. 2, enacts that fines imposed at quarter sessions are to be certified to the clerk of the peace on or before the ensuing quarter sessions, and he is to copy them on a roll, and within twenty-one days send a copy thereof, with a writ of *distringas* and *capias*, or *fiert facias* and *capias*, to the sheriff of the county, which shall be the sheriff's authority for proceeding to the immediate levying of such fines. By sect. 3, the clerk of the peace is to make oath that the roll is truly made up, and that the fines are, to the best of his knowledge, inserted in the roll, and that all fines which have been paid to or received by him are inserted therein, without any wilful discharge or omission.¹ The roll did not contain any entry of the fines having been paid, but at the time when the sheriff received it, he had the fines in his pocket. He knew by Morris not being in gaol that he must have paid the fines. Is the clerk of the peace to find out whether the sheriff, to whom he sends the roll, has received the fines? The sheriff and his officers may receive them at any time, but the clerk of the peace could not well do so.

[COLERIDGE, J. The oath implies that some fines may be paid to him; sects. 2 and 3 both speak of fines "paid" or "to be paid."]

¹ 3 Geo. 4, c. 46, s. 3. "The clerk of the peace or town clerk shall, before he shall deliver the roll to such sheriff, bailiff, or officer, containing the fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them, or any of them, and is hereby required to make oath before any justice of the peace for the county, riding, city, borough, or place for which such clerk of the peace or town clerk shall act, which oath shall be indorsed on the back of the writ, or of the said roll attached thereto, such clerk of the peace or town clerk stating therein all such fines, issues, amerciaments, forfeited recognizances, sum or sums of money which shall have been paid or otherwise accounted for, and such oath shall be made in the form following: — 'I, —, make oath, that this roll is truly and carefully made up and examined, and that all fines, issues, amerciaments, recognizances, and forfeitures which were set, lost, imposed, or forfeited, and in right and due course of law ought to be levied and paid, are, to the best of my knowledge and understanding, inserted in the said roll, and that in the said roll are also contained and expressed all such fines as have been paid to or received by me, either in court or otherwise, without any wilful or fraudulent discharge, omission, misnomer, or defect whatever. So help me God.'"

The word "wilful," in the oath, applies to "omission," as well as to "discharge." The 10th section seems to provide for the remedy for the omission or neglect mentioned in the 3d section.

[COLERIDGE, J. But there is a common-law remedy for imprisonment. That section might apply if there had been no imprisonment.]

Upon the strict reading, if 1s. had been paid and not entered, the clerk would be liable. Here the party to whom the roll was sent had full knowledge of the fact.

[COLERIDGE, J. But if the clerk of the peace contributed to the act, the misconduct of another party will not excuse him. The clerk could easily have discovered whether the payment was made.]

The roll is to be made up within twenty-one days, and fines might be paid after that. The sheriff is not merely a ministerial officer; he has knowledge of the facts, and ought to look to the roll, and see whether the parties therein named are in prison or not.

[COLERIDGE, J. By sect. 14, a duplicate of the roll is to be delivered into the Court of Exchequer, to the intent that the sheriff may be charged in his accounts with the moneys levied and received by him on such writs or otherwise.]

ERLE, J. The sheriff renders his account annually, and the roll is to be a check upon him.]

In practice the clerk of the peace is never called upon to account, but hands over what he receives to the sheriff.

[ERLE, J. According to that, the return should state that the fines are unpaid, and then the sheriff should account for them.]

Ribton, for the respondent. The duty of the sheriff was to levy, but he could not do so until he was set in motion by the clerk of the peace. The stat. 3 Geo. 4, c. 46, makes the clerk responsible for the correctness of the roll which he issues to the sheriff, who is bound to obey it, and the writ annexed to it. The oath taken by the clerk strongly fortifies this view.

[COLERIDGE, J. If the sheriff has received the money, is he bound to levy? If not, the judge was wrong in saying that the sheriff was merely a ministerial officer; and that is a very important part of the ruling.]

ERLE, J. If the action had been against the sheriff, he would have been responsible, and could not have pleaded the roll as his justification. He is ministerial *ad usque* to take the money, but not to take the money and then to take the man also.]

It had been previously decided in the same county court, in an action against the sheriff at the suit of the same plaintiff, that the roll was a justification to the sheriff.

[COLERIDGE, J. With regard to the oath, the clerk is to state whether the fines have been paid to him or not. It is in effect this—so far as I know, they have not been levied; that would still leave it open, if the sheriff knew the fact.]

ERLE, J. The oath is, in effect, to verify a list of fines paid to the clerk. Is he to swear as to the payment to third parties, though he knows nothing about it? The writ from the clerk of the peace is

not absolute, but "so that the money may be ready for payment" at the next quarter sessions. If he has received the money, that is sufficient.]

COLERIDGE, J. If the judge had said, as I think he should, that the sheriff was to judge whether the fine was paid or not, it would have been important to have seen what the sheriff actually did know of the matter; but, by the ruling of the judge, the receipt by the sheriff was made utterly immaterial. There must be a new trial on the ground of misdirection; for when the judge told the jury that the sheriff was merely a ministerial officer, he made many material circumstances immaterial, and so withdrew them from the consideration of the jury. The 2d section and the oath in the 3d, show that he was wrong in this. If ever you should give a reasonable construction to an enactment, it is where an oath forms part of it. The oath is positive as to the fines which have been paid to the clerk of the peace, but only conjectural as to fines which may have been paid to the sheriff in the twenty-one days. It may be under the positive part of the oath that the clerk has made default, but the circumstances are not at present sufficiently ascertained for us to give an opinion on that point. The duty of the sheriff is not merely ministerial, and we must not take the part of the oath which is only conditional — that is, subject to his having received it — as absolute. Where a clerk of the peace has received the fine himself, and omits to return it, and the sheriff, not knowing it has been paid, proceeds to levy it, here, although the sheriff is not wholly free from negligence, as he might have made inquiry upon the subject, yet the clerk of the peace is liable, because the misconduct of a third party will not afford any justification to him. But here the money was never paid to the clerk of the peace absolutely, unless there was such a relation as to make the appointee his servant. We have not, however, sufficient materials to decide that question. The facts of the appointment being by the clerk of the peace, and of the clerk receiving the remuneration, seem to show that the appointee is his servant; but then he may have exceeded his authority; and all these circumstances should be inquired into.

ERLE, J. I am of the same opinion. I altogether dissent from the conclusion of the judge, that the sheriff was bound to levy under the writ, although he had received the fine. It is the duty of the sheriff to attend the criminal court, and to take notice of its sentences; he has authority to receive the fine at any time, and, indeed, is bound to do so, if it is offered. The clerk of the peace, if certain of the fine having been paid, should, in the discharge of his duty, enter it as paid; but I am not clear that he would be answerable if he entered as unpaid what had been paid to the sheriff. What is payment to a sheriff is often a contestable fact. He may enter it as paid, but I hesitate to say that he would be responsible if he did not do so. I am clear that under this writ the sheriff, if he has received the money before the writ comes to his hands, must not levy, and that he cannot justify under the roll or writ, in an action against him for making a

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levy under such circumstances. I am of opinion that under the statute the clerk of the peace may receive fines; and if, after having done so, he does not enter them as paid, he would be responsible. But this fine was not paid into his hands; and one question would be, whether the assistant had independent authority. Is the hand of the assistant the hand of the clerk of the peace? As the statute says the clerk of the peace is to have the remuneration, and as, if he were to put an articled clerk of his own in, he might put the remuneration into his own pocket, there is strong evidence to show that the appointee, as he has been called, was a servant of the defendant; but that fact is not ascertained.

New trial without costs.

THE COURT at first were about to grant the costs, but, on consideration, said they were of opinion that there were special circumstances in the case which ought to prevent the costs of the new trial from being granted.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER;

DURING THE YEAR 1852.

IN THE EXCHEQUER CHAMBER.

THE GREAT NORTHERN RAILWAY COMPANY *v.* HARRISON and
others.¹

June 16 and 17, 1852.

*Implied Covenant — Construction — Condition precedent — Readiness
and Willingness.*

An indenture between the plaintiffs below and the defendants below, (a railway company), after reciting that the defendants were desirous of being supplied with 350,000 railway sleepers, and that the plaintiffs were willing to supply them according to the terms of a specification and tender, contained a covenant by the plaintiffs that they would supply the sleepers within the time specified, "as, and when, and in such quantities, and in such manner" as the engineer of the company, by order in writing, "from time to time, or at any time within the period limited by the specification, should require." The specification stated that the number of sleepers required was 350,000; that one half would have to be delivered in 1847, and the remainder by midsummer, 1848. The deed also contained provisos that the engineer might vary the times of delivery; that the company should retain 2,000*l.* in their hands as security for the performance of the contract, and should pay it over within two months after all the sleepers had been delivered; and that the contract

¹ 16 Jur. 565; 22 Law J. Rep. (N. S.) C. P. 49. Error from the Common Pleas. Coram PARKE, B., WIGHTMAN, J., ERLE, J., PLATT, B., MARTIN, B., and CROMPTON, J.

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might be put an end to upon default made by the plaintiffs, or upon their bankruptcy or insolvency :—

Held, First, that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers.

Secondly, that an order by the engineer was a condition precedent to any delivery of the sleepers by the plaintiffs.

Thirdly, that the company were bound to cause such order to be given within the time limited by the specification.

Fourthly, that although the engineer had power to alter the time for the delivery of the sleepers, such power was to be exercised within the period limited by the specification.

Fifthly, that the engineer, as to matters in which he had a discretion, *e. g.* as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties, but as to giving the order for the delivery he was a mere agent of the company.

The only legitimate rule of construction is to ascertain the meaning from the language used in the instrument, coupled with such facts as are admissible in evidence to aid its explanation.— *Per Parke, B.*

In an action upon the above deed, on the ground that the company had not given any order for the delivery of sleepers within the specified period :—

Held, that it was unnecessary to aver readiness and willingness to deliver them, as the plaintiffs were not bound to be ready and willing until the order was given.

THIS was a writ of error upon the judgment of the Court of Common Pleas, which had been given for the plaintiffs below, upon demurrer, to several pleas of the defendants, and also upon judgment *non obstante veredicto* for the plaintiffs, upon the third plea. The case in the court below is reported 16 Jur. 453; s. c. 8 Eng. Rep. 469, where the pleadings and the deed upon which the question turned are sufficiently set forth.

Bovill, (*Raymond* with him), for the plaintiffs in error, (the defendants below). The declaration is bad, and the third plea good. The action was by contractors against a railway company, upon a contract for the supply of railway sleepers, and the only breach averred in the declaration was, that the engineers of the company did not give any orders within the time specified for the delivery of the said sleepers. The question on the plea would resolve itself into an objection to the declaration, namely, that it did not aver that the company had notice of the plaintiff's readiness and willingness to deliver the sleepers. The deed set forth in the declaration, and upon the construction whereof the main point as to the obligation of the company to take the sleepers arises, recited that the company were desirous of being supplied with 350,000 sleepers, but it did not state that they had agreed to take them. According to the specification which is there referred to, one half of the sleepers were to be delivered in 1847, and the remainder by midsummer, 1848. It was then recited that the contractors were willing to supply the sleepers upon the terms in the specification and tender, but it was not recited that the company agreed to take them, nor was it an unreasonable arrangement, considering the nature of railway companies, that they should not be bound to take them. Then follow the covenants of the contractors, which are not in consideration of the company agreeing to take the sleepers, but in consideration of "the covenants and agreements" of the company.

The first part of the deed contains the covenants of the contractors, and is their language. In *Elderton v. Emmens*, 4 C. B. 479, great reliance was placed upon the term "agreed," as importing the language of both parties; but that word is not found here. The language in the deed, on which the other side rely as creating a covenant upon the part of the company to take the sleepers, is put in for the company's benefit, and is a mere qualification of the contractors' covenant. If it had stood on the specification, the contract would have been satisfied by the delivery of the sleepers a reasonable time before the end of the days therein mentioned; *Startup v. Macdonald*, 6 Man. & G. 593; and this covenant was to entitle the company to an earlier delivery. The words are, "that the contractors shall, within the times and at the place mentioned in the said specification, as, and when, and in such quantities, and in such manner as Joseph Cubitt or John Miller, or other the principal engineer, or one of the principal engineers for the time being of the company, shall, by order or requisition in writing under his hand, from time to time, or at any time within the period limited by the specification, require," supply the company with the sleepers. This is a covenant to deliver as and when required, not a covenant by the company to require; and its utmost effect is to make the requirement a condition precedent to their right of complaint for non-delivery. There is a subsequent proviso for the engineer to change the time of delivery if he thinks proper. How, then, can a covenant be implied that he shall give orders for the delivery within the time mentioned in the specification? He might have ordered the sleepers after midsummer, 1848. The company then covenant to pay, upon the certificate of their engineer, for the sleepers delivered; and it was a condition precedent to the contractors' right to recover that they should have obtained such certificate. *Morgan v. Birnie*, 9 Bing. 672; *Milner v. Field*, 5 Exch. 829. If the certificate was wrongly withheld, relief would be obtainable in equity. *M'Intosh v. The Great Western Railway Company*, 2 Mac. & G. 74. There is not one word throughout the deed by which the company covenant to take the sleepers, or that their engineer shall do any thing but examine them; they have provided that their engineer should have complete control in the matter, and this was necessary for their protection. There is an express covenant as to the duty of the engineer to examine the sleepers; and, according to the rule, "*expressum facit cessare tacitum*," no implication arises that any other covenant was made with reference to his duties.

A covenant cannot be implied where the words are words of qualification, introduced for the benefit of the party against whom it is sought to raise the implication, and where it is the language of the other party. Com. Dig., "Covenant," A. 3. "If a lessee covenants to repair, provided that the lessor finds timber, this is not a covenant by the lessor to find it, if there be not the word 'agreed.' If B. covenants to pay 100*l.* to A., and he covenants, upon receipt, to give an acquittance, and to make an obligation, &c., it is not any covenant that he will receive and give an acquittance." *Woolveridge v. Stew-*

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ard, 1 Cr. & M. 644, is a very important authority upon this subject, and every word of the judgment there is applicable to the present case. There is no necessity here to imply a covenant, on the part of the company, to take the sleepers. If there be such a covenant, there must also be one to take them within the specified times, and that their engineer should give the orders, and should certify. There are some authorities upon the question of mutual covenants, where they might well have been implied, but were not. *Lees v. Whitcomb*, 5 Bing. 54; *Williamson v. Taylor*, 5 Q. B. 175; *Aspden v. Austin*, Id. 671; *Dunn v. Sayles*, Id. 685; *Elderton v. Emmens*, 6 C. B. 160, now in the House of Lords.

[ERLE, J. In several of those cases the court held that there was a covenant to pay, although not one to find with work. In *Elderton v. Emmens* the court said, that the word "employ" did not mean "find with legal business."

PARKE, B. We had a case not long ago in the exchequer, in which we held that the question was, whether the parties had obliged themselves to do the act, not whether they expected that it was to be done.]

If it is said that the engineer had only a reasonable time after midsummer, 1848, for extending the time of delivery, there is no averment of a reasonable time having elapsed, and so the declaration is bad. As to the third plea, it was necessary to aver readiness and willingness to deliver, and also notice thereof. *Hannuic v. Goldner*, 11 M. & W. 849; *Granger v. Dacre*, 12 M. & W. 431; *Doogood v. Rose*, 9 C. B. 132.

[PARKE, B. We are all agreed that the plaintiffs below need not have been ready and willing to deliver until the company gave their orders by their engineer. The company was to take the first step.]

Willes, (*Bramwell* with him), for the defendants in error. In whatever part of a deed the intention appears that a party is to be bound to do an act, whether in a recital, the covenant of the opposite party, or by the covenant of the party himself, it is sufficient, without having the covenant set down in any particular part of the deed appropriated to the covenants of the party sought to be charged. In this case there is an express covenant to take all the sleepers within the specified period. The specification and tender form the basis on which the contract proceeded, and it appears from them that the company required the whole number of the sleepers, and that the contractors were to deliver them; and there are no words giving an option to take a less quantity. The recitals of the deed refer to the times mentioned in the specification within which the sleepers will be "required to be delivered." Looking at the specification for the intention of the parties at the time of the preparation of the contract, which is expressly stated to be made upon its terms, we find the words are, "the number of sleepers required under this specification is 350,000," not that they are to have an option as to the number; and throughout the contract, whenever the number is referred to, it is always 350,000. The quantity to be supplied and taken, forms one

of the elements in the calculation of the price. It has not been suggested on the other side that any part of the deed is inconsistent with this construction, and it may, therefore, be taken that it is consistent with the whole of the contract that the whole number should be taken. The specification goes on to state that "one half will have to be delivered in 1847, and the remainder by midsummer, 1848. The port at which the deliveries will have to be made is Goole." It is on the faith of this specification that the contractors make the tender; and this is the language of both parties, incorporated with the contract by the recital. The sleepers are also to be cut from logs of good sound Dantzic or Memel timber, which the contractors would have to provide. It is not probable that they would be bound to have them ready whether they were to be taken or not, and mutuality would be expected in a contract of bargain and sale. In the contract there is a provision that no payment shall be made to the contractors until sleepers above the value of 2,000*l.* shall have been delivered, and that such sum shall be retained by the company without interest, for the purpose of securing the performance of the contract; and within two calendar months after the whole 350,000 sleepers shall have been delivered, that sum was to be paid over to the contractors. This provision is manifestly incongruous with the construction contended for by the other side, and it involves a contract by the company to do all on their part to enable performance by the contractors, so that they may receive their money. It is, in effect, a covenant by the company that a time shall come when the money shall be paid over.

It is argued for the plaintiffs in error that the company, or their engineer, (which is the same thing), may abstain from giving any orders; but if so, what was the use of the provision enabling the company to put an end to the contract in certain events, namely, the contractors making default in the delivery, or becoming bankrupt or insolvent, in which cases the company may "absolutely determine this contract," showing that they treated it as a contract on the part of the company, for the determination of which a special clause was required, and not a simple abstaining from giving orders?

[PLATT, B. This provision seems to show that the company desired not to be bound to perform the contract by the assignees of the contractors; and that receives confirmation from another part of the contract, where the "assigns" of the contractors are to be approved of by the company. But if they were not bound at all, this provision was unnecessary.]

The engineer may order the forms of the sleepers to be altered, and may vary the time of delivery; but the contractors are "to derive the same proportionate amount of profit" as if no such alteration had been made. That is the language of both parties, and is clearly inconsistent with a discretion in the engineer to say that no sleepers at all are to be delivered. If he has that power, there is no provision whatever for compensation to the contractors. He has power to change and vary the time, but not to extend it; the quantity to be delivered and the period of delivery are stated, and the only discretion

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is as to the portions of the 350,000 sleepers, and periods of delivery within the time specified. The main limits of the contract are to be preserved. Even if there was power to extend the time, the order for the extension should have been given within the limited time; and the breach in the declaration is, that no order whatever was given, which would include an order for extending the time. If this be not so, yet the power to extend is a mere condition subsequent, and if exercised, it was an act done by the company to modify the contract, and it was for them to plead it. In this respect, the case is like *Hotham v. The East India Company*, 1 T. R. 638. The cases cited by the other side are inapplicable to the present. *Wood v. The Copperminers Company*, 7 C. B. 906; *Stevenson's case*, 1 Leon. 324; *Saltoun v. Houston*, 1 Bing. 433; and *Sampson v. Easterby*, 9 B. & Cr. 505; s. c., in error, 6 Bing. 644, are authorities in favor of the plaintiffs below.

[PARKE, B., referred to *Shep. Touch.* 162, as showing that no form is necessary for a covenant.

MARTIN, B., referred to the late case of *Rashleigh v. The South-eastern Railway Company*, in the exchequer chamber, in which all the authorities on the subject were cited and discussed.¹]

Cannock v. Jones, 3 Exch. 233, afterwards in the house of lords, where judgment was affirmed, strongly bears on the present case. In one class of cases, referred to by the other side, the engineer or surveyor had an absolute discretion, but here it is only as to details. *Dallman v. King*, 4 Bing. N. C. 105. As to the class of decisions relating to mutual covenants, there are later cases cited in *Elderton v. Emmens*, in which a stipulation, that the contract might be put an end to by the Master, was held to raise the implication that there was a covenant to employ, and such a stipulation is here.

Bovill, in reply. It is conceded that there is no covenant in express terms, but it is sought to extract it from the deed by astute reasoning and elaborate argument. If that be the rule of construction, the court will make a contract for the parties, instead of their making it for themselves. The burthen of showing the covenant lay on the other side, and if there are two constructions, the plaintiffs below must fail. The power to determine the contract is vested in the company, who may exercise it in defiance of the engineer; and it is, therefore, quite different from the power of ordering the delivery of

¹ *Rashleigh and another v. The South-eastern Railway Company*. This case was argued in the Court of Exchequer Chamber in June, 1851, and February, 1852, before PARKE, B., PATTESON, J., ALDERSON, B., WIGHTMAN, J., PLATT, B., and MARTIN, B. The question was, whether there was an implied covenant on the part of the company to make a watercourse; but the court ultimately suggested, and the parties consented to an arrangement. The following cases were cited in addition to several of the authorities referred to in the above case. *Hollis v. Carr*, 2 Mod. 86; *The Duke of St. Albans v. Ellis*, 16 East, 352; *Lord Shrewsbury v. Gould*, 2 B. & Al. 487; *Seddon v. Senate*, 18 East, 63; *Rigby v. The Great Western Railway Company*, 4 Exch. 220; Com. Dig., "Covenant," A. 1, E. 2; Vin. Ab., "Covenant," F.; and *Burnett v. Lynch*, 5 B. & Cr. 589.

the sleepers. The latter is vested in the engineer, not as a servant of the company, but he was rather as an arbitrator between the parties, and was to exercise a discretion of his own. The events on which the 2,000*l.* is to be paid over are three — the delivery of the sleepers, the certificate being given, and the accounts being adjusted. Can it be, therefore, said that the company covenanted to certify and to adjust their accounts, as well as to take the sleepers? The court have not the materials before them for saying what would be a reasonable contract between the parties under all the circumstances.

[PARKE, B. The only legitimate rule of construction is to ascertain the meaning from the language used by the instrument. During the time that I have been a judge, I have always endeavored to ascertain the meaning of instruments, whether wills, acts of parliament, or contracts, from the words used in them, coupled with such facts as are admissible in evidence to aid their explanation. The intention must be gathered from the instrument, and not from my notion of intention.]

PARKE, B. I am of opinion, and the rest of the court concur with me, that the judgment of the Common Pleas should be affirmed, although during the course of the argument we entertained some doubt upon several of the points raised. It is clear, from the authority of *Shepherd's Touchstone*, and numerous cases, that no special form is necessary to constitute a covenant; but where from the whole of the instrument it can be inferred, it is a covenant in law. It is immaterial whether it is found in the recitals of the instrument or elsewhere. Applying that rule to this case, we are to see whether there is an implied covenant on the part of the company as stated on this record, namely, that their engineer should give to the plaintiffs below an order for the delivery of the sleepers. Looking at the whole of the instrument, we think that a covenant to this effect can be distinctly made out. We are only to incorporate with the deed so much of the specification and tender as is expressly incorporated therewith by the recitals; but that alone furnishes ample evidence that the company agreed to take the 350,000 sleepers. If it had been recited that the company "agreed" to take, instead of the words that they were "desirous" of taking, no question could have arisen as to the liability of the company; but looking at the recitals and part of the specification, we think that it is the same as if that word had been used. It is as if the company had said, "We require the sleepers to be delivered in 1847 and 1848, and at such a port." According to the cases, that is sufficient to import an agreement by the company to take. There are two clauses which prove to demonstration that the company themselves understood, as the other side understood, that they had contracted to require the full number of the sleepers. The first is that which provides for the determination of "this contract." It would be idle to provide for the determination of the contract on the other side; they mean their contract, and it is the same as if it had been so stated. Their contract must be either to require 350,000 sleepers, or so many of them as might be required by their engineers.

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The reasonable construction is the former, and the engineers in that respect would be only the agents of the company.

I agree that in matters which they are to decide, the engineers are arbitrators between the company and the contractors, and the company have no control over them, and no action would lie against the company if the engineers refused to arbitrate, or did so improperly. But the company do not constitute the engineers their agents to decide whether any portion of the sleepers are to be delivered. Can it be supposed, that after expense incurred by the contractors towards the fulfilment of their contract, its performance is to be dependent on the will of the engineers? This construction is greatly fortified by the other clause, with respect to the 2,000*l.*, which imports a covenant, in the language of both parties, that the company will at least demand sleepers to the amount of 2,000*l.* or upwards; by the contract, that sum is to be paid over when all the sleepers are delivered, and not before. It was not meant that the plaintiffs below should lie out of their money forever; and therefore it does import a contract to order the sleepers. It follows, from what I have said, that the engineers, for the purpose of giving the orders, were mere agents, and the company agreed to take the sleepers within the time specified, and to give orders through their engineers before midsummer, 1848. Then it is said that the engineers have power to extend the time, but that means within the previous limits. The contractors are to furnish and supply the sleepers in that period, as and when, and in such quantities, and in such manner as Joseph Cubitt or John Miller, or other the principal engineer, shall order from time to time, or at any time within the period limited by the specification. When is that period? Midsummer, 1848, because the contract is to deliver by that time. Before that period they may alter the forms and sizes of the sleepers, and the times of delivery. The reasonable construction is, that they may give an original order to deliver 10,000 sleepers, for instance; and they may vary that order, making some compensation for the loss occasioned by the alteration. Thus, if they order 10,000 to be delivered in a month, they may afterwards say, "deliver them in a fortnight at an increased price;" but all these orders are to be given within the specified limits. If not, they might wait for two years without giving an order. Could it be so intended, the plaintiffs deprived of their capital, and losing the benefit of their stock during that time? Although the order of the engineers is not intended to be a final order, yet it is capable of alteration only within the original limits.

Judgment affirmed.

The Fishmongers Company v. Dimsdale.

IN THE EXCHEQUER CHAMBER.

THE FISHMONGERS COMPANY v. DIMSDALE and others.¹

June 16, 1852.

Stamp — Agreement — Memorandum indorsed.

An agreement was entered into between the plaintiffs and R. O., and the defendants, by which the former were to withdraw their opposition to the passing of an act of parliament for reclaiming certain waste land, in consideration of the payment of 1,000*l.* and the allotment to them of certain portions of the waste land, and it was stamped with a 3*s.* stamp. A few weeks afterwards the following memorandum was indorsed upon it:—"Memorandum. It is understood between the parties within named, that the within mentioned wardens and commonalty [the plaintiffs,] and the said R. O., are only severally, and not jointly, held and bound for the fulfilment of the within mentioned agreement on their own respective parts, but not for each other; and that the sum of 1,000*l.*, within mentioned, to be paid to the said wardens and commonalty, is for certain costs and expenses which they, the said wardens and commonalty, have been put to during the present year, partly in the survey made by Mr. M'N., and for his plans and valuations, which survey, plans, and valuations the several persons within named to be parties of the third part are to have the benefit of, but that they are to be forthwith returned to the said wardens and commonalty if the said sum of 1,000*l.* shall not be duly paid as within mentioned; and it is also agreed, that the within mentioned agreement for withdrawing the opposition and facilitating the bill as within mentioned, shall only be and remain in force for the present session of parliament, 1837 and 1838." The memorandum was stamped with a 1*l.* stamp, and, together with the agreement, contained more than 1,080 words:—

Held, that the memorandum was a distinct agreement, and so sufficiently stamped with a 1*l.* stamp.

Held also, that if it had incorporated the agreement on which it was indorsed, the number of words in the agreement was immaterial, and that then it was a case not exactly met by the words of the Stamp Act.

This was a writ of error upon a bill of exceptions tendered by the plaintiffs below to the ruling of Jervis, C. J., at the trial at the London sittings after Michaelmas term, 1850. The action was brought upon an agreement, dated the 17th March, 1838, and entered into between John David Towse, on behalf of the plaintiffs, of the first part, Thomas Glover Kensit, on behalf of Robert Ogilby, of the second part, and the several defendants of the third part, by which, after reciting that a petition had been presented to the house of commons, at the instance and on behalf of the defendants, for leave to bring in a bill for draining, embanking, and reclaiming the slob or waste land in Lough Swilly and Lough Foyle, in the counties of Donegal and Londonderry; that the plaintiffs and one Robert Ogilby were respectively entitled to certain lands abutting upon certain parts of the said waste land in Lough Foyle, and in respect of such lands claimed to be entitled to the said waste land adjacent thereto, and to certain privileges in the same; and that the plaintiffs and

¹ 16 Jur. 799; 22 Law J. Rep. (N.S.) C. P. 44. Error from the Common Pleas. *CORNER PARKER, B., WIGHTMAN, J., ERLE, J., PLATT, B., MARTIN, B., and CROMPTON, J.*

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Ogilby objected to and had opposed the introduction of the intended bill into parliament; it was mutually agreed by and between the said parties, "that the said Fishmongers Company and the said Robert Ogilby shall respectively withdraw all opposition to the further progress of the bill to be brought into parliament, and promoted by the said parties hereto of the third part, for draining, &c.; that the several powers and authorities to be granted by the said bill, and the several clauses, &c., shall be agreed upon and settled by and between the solicitors of the said parties hereto, before any proceedings shall take place thereupon in committee of either house of parliament, to the intent and with the object that the said bill may be as perfect and beneficial for the interest of all the said parties in the reclamation of the said slob or waste land as it can be made." [Here followed provisions for referring to arbitration any dispute which might arise in framing the bill; that the plaintiffs and Ogilby should use all reasonable means for promoting the bill, and obtaining an act of parliament; that a certain portion of the waste land should be allotted and given to the plaintiffs; and that a certain other portion should be allotted and given to Ogilby.] "That such respective allotments or proportions shall be absolutely reserved in the intended act to the said Fishmongers Company and their successors, and to the said Robert Ogilby and his heirs respectively, free and indemnified of and from and against all costs, &c., attending the embanking, &c., the said slob, or any other charge, stipulation, restriction, or condition whatsoever; and [the defendants] do hereby undertake and agree that they will, on the passing of the said intended act, pay to the said Fishmongers Company the sum of 1,000*l.*, and shall and will pay all costs and expenses of and attendant upon the application for and obtaining the said act. And, lastly, it is agreed by and on the part of the Fishmongers Company, and the said Robert Ogilby, that the aforesaid proportions or allotments of the said slob or waste land, when reclaimed, which shall be allotted to them respectively as aforesaid, shall be received and taken by them respectively in full of all rights and claims of the said Fishmongers Company, and the said Robert Ogilby, respectively, in respect of the said slob or waste land; and that the said Fishmongers Company and the said Robert Ogilby, respectively, will protect and indemnify [the defendants] from and against any right or claim derived from or under the said Fishmongers Company and the said Robert Ogilby, respectively, which shall or may be made by any of their said tenants respectively, in, to, or upon the said slob or waste land, or any part thereof, save and except as to any contract or engagement which may have been entered into by [the defendants], or any or either of them, with the said tenants respectively, or any or either of them, in respect thereof." This agreement had been ingrossed and executed in two parts, each part being stamped with a 3*5s.* stamp. A few weeks after their execution a memorandum was indorsed upon each in the following terms:—"It is understood between the parties within named that the within mentioned wardens and commonalty [the plaintiffs] and the said Robert Ogilby are only severally, and not jointly, held and bound for

the fulfilment of the within mentioned agreement on their own respective parts, but not for each other; and the sum of 1,000*l.* within mentioned, to be paid to the said wardens and commonalty, is for certain costs and expenses which they, the said wardens and commonalty, have been put to during the present year, partly in the survey made by Mr. M'Neil, and for his plans and valuations, which survey, plans, and valuations the several persons within named to be parties of the third part are to have the benefit of, but that they are to be forthwith returned to the said wardens and commonalty, if the said sum of 1,000*l.* shall not be duly paid as within mentioned; and it is also agreed that the within mentioned agreement for withdrawing the opposition and facilitating the bill, as within mentioned, shall only be and remain in force for the present session of parliament, 1837 and 1838." One of the three memorandums was stamped with a 35*s.* stamp, and one with a 1*l.* stamp. At the trial, the agency of the parties signing the documents having been proved, the agreement in possession of the defendants, signed by the plaintiffs' agent, was read, together with the memorandum, that agreement and memorandum being produced by the defendants when called for, and they were each stamped with a 35*s.* stamp. It was then proposed, on the part of the plaintiffs, to read the other part of the agreement and memorandum. When the memorandum had been read, an objection was raised, on the part of the defendants, that the agreement on which it was indorsed could not be read in evidence as part of, and incorporated in, the memorandum, because the memorandum and agreement contained together more than 1,080 words, and, therefore, that there should have been another 35*s.* stamp instead of a 1*l.* stamp on the memorandum, and that the said agreement could not be read as an independent agreement, without calling the attesting witnesses to the same. A witness was then permitted, on the part of the defendants, to count the number of words, and it was proved that the agreement and memorandum contained together more than 1,080 words. The learned judge ruled in accordance with this objection, and to such ruling the bill of exceptions was tendered.

Bovill, for the plaintiffs in error. The agreement, stamped with a 35*s.* stamp, and indorsed with a memorandum stamped with a 1*l.* stamp, was admissible in evidence, because, first, on the construction of the agreement and memorandum, they together formed but one agreement for the purpose of a stamp. The memorandum merely explains the intention of the parties, and is not of a nature to require a separate stamp. Secondly, if this be not so, and two stamps were necessary, yet the 20*s.* stamp is sufficient on the memorandum. For the purpose of a stamp on the memorandum, the words within the document are not to be read; but if they are, the 35*s.* stamp on the document itself is sufficient. Thirdly, if the memorandum be a new and separate agreement, then, there being the signature of only one party to each memorandum, they both together form one agreement, and one stamp is sufficient, as in the case of an agreement by letters; and fourthly, the subject-matter of this memorandum is not of the

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value of 20*l*. Another matter may have to be discussed, namely, whether, under the circumstances of the case, it was necessary to call the attesting witness.

[PARKE, B. That was decided in this case and by this court, 6 C. B. 896.]

J. Brown stated that, at the trial, Jervis, C. J., thought the point was not expressly decided in that case.

The question formerly before this court was as to the necessity of calling the attesting witness, and it was held to be unnecessary, because, where a memorandum refers to a document, that document is incorporated with and forms a part of it. But, in fact, there are other grounds upon which it was unnecessary, namely, the indorsement referring to the agreement was evidence, as an admission of the party against whom it was sought to be used, that it was his agreement. *Dillon v. Crawley*, Holt, 299. First, this was only one agreement for the purpose of a stamp. The point was discussed in the Court of Common Pleas in this case, (1 C. B. 67,) but no judgment was given upon it. A new trial was ordered, and then the part was stamped. The lapse of two or three weeks between the execution of the agreement and the writing of the indorsement, makes no difference, and matters much more distinct than these have been held to constitute one agreement. *Taylor v. Parry*, 1 Man. & G. 604, 609; *Stead v. Liddard*, 1 Bing. 196.

[PARKE, B. That might be upon the ground that the first was only an inchoate agreement; this is rather an alteration.]

This is rather an explanation than an alteration.

[ERLE, J. It is not necessary to cite cases on this point; the principle is, that if subsequent additions were within the original contemplation of the parties, it is only one agreement.]

The agreement is one to withdraw opposition to a bill about to be brought before parliament, and to pay 1,000*l*., the action being brought to recover that sum. On the face of the document itself there is no joint undertaking, and the memorandum is an explanation why it had been agreed to pay 1,000*l*., to avoid the objection which at one time was considered tenable, that such an agreement was illegal. If this view as to its forming only one agreement be correct, the 35*s*. stamp was sufficient, without the 1*l*. stamp; but if the memorandum be considered as a new agreement, it was sufficiently stamped with a 1*l*. stamp, because, by itself, it does not contain 1,080 words. The language of the Stamp Act, 55 Geo. 3, c. 184, sched. "Agreement," is "An agreement, or any minute or memorandum, &c., not otherwise charged in the schedule to that act, &c., together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto, shall bear a 1*l*. stamp, if not containing more than 1,080 words; if more, then a 35*s*. stamp." But this was not a schedule, receipt, or other matter *ejusdem generis*, and the agreement is not indorsed on the memorandum, but the memorandum on the agreement. *Attwood v. Small*, 7 B. & Cr. 390; *Weedon v. Woodbridge*, 13 Jur. 630, note.

[WIGHTMAN, J. The precise point is taken by Lord Tenterden in *Attwood v. Small*.] [He was then stopped by the court.]

J. Brown, for one of the defendants in error. It is submitted that *Attwood v. Small* and *Weedon v. Woodbridge* are not law. In Tilsley's Stamp Laws, 542, it is said, in remarking on the case of *Attwood v. Small*, "Perhaps, as the last agreement was indorsed on the second, the court considered that the writing in the second could not be said to be put or indorsed on the other, or annexed thereto, without an unauthorized inversion of the terms of the enactment. This mode, however, of escaping from the difficulty is any thing but satisfactory." If the words are not to be counted because the memorandum is on the document, instead of the document being on the memorandum, the stamp laws will be frequently evaded. They expressly provide for "agreements" and "schedules," in order to prevent an evasion of their provisions. Under the latter head they provide for a schedule being a separate and distinct agreement, but, where it is indorsed on the agreement, the words are to be counted. *Veal v. Nicholls*, 1 Moo. & R. 248; *Lake v. Ashwell*, 3 East, 326. The original stamp on the agreement was spent and used. *Bacon v. Simpson*, 3 M. & W. 78; *Sneezeum v. Marshall*, 7 M. & W. 417.

Crowder, (*Hindmarch* with him), for another of the defendants in error, applied to be heard, upon the ground that judgment had been given for all the defendants, and that they all had an equal interest in keeping it. The court agreed to hear him on this occasion, but did not decide that he had a right to address them as a second counsel on a writ of error. He referred to the judgment of the court in this case in 6 C. B. 896, as showing that one agreement was contained in and incorporated with the other, and endeavored to distinguish *Weedon v. Woodbridge*, from the case before the court.

Bovill was not called upon to reply.

PARKE, B. All of us are of opinion that the chief justice was wrong in the construction he put upon certain *dicta* of the judges, who decided this case in 1848. Reliance has been placed principally upon the court there having decided that there was one agreement by incorporation. But if the report be looked to, it will be found that all they say is, that the former instrument was recognized as binding, so as to make it unnecessary to call the attesting witness. No reference was there made to the stamp laws. What the instrument contains must be collected from the instrument itself. Looking at the memorandum, it does not incorporate the former agreement, but merely states a several liability, and shows for what the 1,000*l.* is to be paid. But even if it did incorporate the former agreement, there are two decisions showing it to be unnecessary to count the words of the agreement. We think we ought to abide by those decisions. There may be evasion of the stamp laws in consequence, but we cannot help that. That is for the legislature to consider. The words of the Stamp Act must be very clear for the imposition of a charge upon the subject. This is a distinct agreement, and so a 1*l.* stamp was

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sufficient. If it were not so, it incorporates the former agreement, and then it would be a case not exactly met by the Stamp Act.

Venire de novo.

IN THE EXCHEQUER CHAMBER.

HEATH v. UNWIN.¹

May 11, and June 21, 1852.

Patent, Infringement of,— Use of Elements of Composite Substance.

The use of the elements of a composite substance is a use of the composite so as to be an infringement of a patent for the use of the composite substance.

Where the elements of a composite substance are used, and in the process of the manufacture the composite is itself formed, this is not the use of an equivalent for that substance, but the use of the substance itself.

A patent for the use of a substance in a process is infringed by the use of a chemical equivalent, known to be so at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colorable variation therefrom. Per Erle, J.

The plaintiff took out a patent for certain improvements in the manufacture of steel, and claimed "the use of carburet of manganese in any process whereby iron is converted into cast steel;" and in the description of his process he said that he proposed to make his improved steel by introducing into a crucible broken steel or malleable iron and carbonaceous matter, with from one to three per cent. of their weight of carburet of manganese, and melting them together. The defendant put oxide of manganese and carbonaceous matter into the crucible with the iron, and produced the same result, and an action was brought against him for the infringement of the plaintiff's patent. At the trial it was proved that during this process the oxide of manganese and the carbonaceous matter combined, and formed a carburet of manganese, and then, in the same process, but at a higher temperature, this carburet acted upon the iron and produced the same result as that effected by the plaintiff's process. The learned judge directed the jury that there was no evidence of an infringement, and a bill of exceptions was thereupon tendered:—

Held, in error, (*dissentientibus* ALDERSON, B., and COLLERIDGE J.) First, that there was evidence for the jury of the infringement of the plaintiff's patent. Secondly, that the discovery claimed by the patent was the use of the carburet of manganese, and that the plaintiff was not limited to the mode of working mentioned in his specification; and although the defendant's process might constitute a different manner of manufacturing carburet of manganese, yet, if he used it in the conversion of iron into steel, he infringed the patent.

THIS was an action for the infringement of a patent. The case was tried before Cresswell, J., at Westminster, on the 30th of November, 1850. The material question arose on the issue on the plea of not guilty, as to which his lordship (in accordance with the decision of the Court of Exchequer, in another action between the same parties, 13 Mee. & W. 583; s. c. 14 Law J. Rep. (n. s.) Exch. 153,) directed the jury that there were no evidence of any infringement.

¹ 16 Jur. 996; 22 Law J. Rep. (n. s.) C. P. 7; before ALDERSON, B., COLLERIDGE, J., WIGHTMAN, J., ERLE, J., PLATT, B., and CROMPTON, J.

A bill of exceptions was tendered to this ruling, which stated the following facts.

The plaintiff's patent, dated the 6th of April, 1839, was for certain improvements in the manufacture of iron and steel.

The specification declared the nature of the invention to be, fourthly, "the use of carburet of manganese in any process whereby iron is converted into cast steel;" and as to this, he stated the manner in which the invention was to be performed, thus:—"I propose to make an improved quality of cast steel, by introducing into a crucible bars of common blistered steel, broken as usual into fragments, or mixtures of cast and malleable iron, or malleable iron and carbonaceous matters, along with from one to three per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, which are, when fused, to be poured into an ingot mould, in the usual manner; but I do not claim the use of any such mixture of cast and malleable iron, or malleable iron or carbonaceous matter, as any part of my invention, but only the use of carburet of manganese in any process for the conversion of iron into cast steel." Evidence was given to show that before the time of the plaintiff's patent, neither carburet of manganese (which is a combination of carbonaceous matter with the black oxide of manganese), nor the component elements of carburet of manganese had been employed in the manufacturing of cast steel. Attempts had been made to make cast steel with the black oxide of manganese, but had failed, for the oxide broke the pots, or rendered them porous, so that the metal ran through. It was also stated that, by the process described in the specification, very superior cast steel was produced. At first, after taking out the patent, the plaintiff made his carburet of manganese by putting oxide of manganese, mixed with coal tar, into a pot lined with charcoal, and exposing it to an excessive heat; the two substances, acting on each other, mutually produced the carburet. The carburet thus obtained was put into the pot in which the steel was, when the steel was in a fused state. The plaintiff afterwards discovered that if, instead of making the carburet of manganese separately, first, he took coal tar, or other carbonaceous matter, and the black oxide of manganese, and mixed them into a paste, and put them into the crucible where the steel was being melted, the same superior cast steel was produced, and at a greatly diminished expense, for one pot and one heating served the double purpose. The plaintiff subsequently made use of this composition of mixed oxide of manganese and coal tar, and supplied the defendant, and other manufacturers, with some of it. Sometimes the composition was put into the crucible with the iron when cold, and at other times in various stages of fusion of the metal. It was admitted that since the date of the patent, the defendant had manufactured cast steel by using oxide of manganese and carbonaceous matter introduced into the pot at the same moment as the steel, each of such ingredients being at the time of introduction separate and apart, and not in combination with the others. Scientific witnesses stated their opinion that when the oxide of manganese and carbonaceous matter

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were introduced into the pot with the steel, the carburet of manganese would be formed by the combination of the oxide and carbon at a lower temperature than would melt the steel, and that the carburet of manganese when so formed would afterwards combine with the steel.

A. J. E. Cockburn, (*Bramwell* and *Webster* with him,) for the plaintiff. The plaintiff had taken out a patent for the use of carburet of manganese in the manufacture of cast steel. Oxide of manganese had been formerly tried, but had failed because of its affinity with the earthy matter of the melting pots. The plaintiff's process avoided this difficulty. The mode of making steel, adopted by the defendant, and of which the plaintiff complains, was this—he did not put carburet of manganese into the crucible, but he took oxide of manganese and carbonaceous matter, and put them into it; they contained the elements of carburet of manganese, and there was, therefore, a double process in the crucible, namely, the carburet was made first, and then the steel. The invention of the plaintiff turned out to be so valuable as to effect a revolution in the trade. Formerly, to make welded cast steel, it was necessary to have, the best Russian or Swedish iron, but his improvements rendered available the native metal, though it was of an inferior character. It was admitted that the defendant had used the same elements and produced the same result. The question is, whether he has infringed the patent. The Court of Exchequer said that he had not, considering intention an ingredient in the case. The evidence in this case raised what was stated by the Court of Exchequer as a matter of speculative opinion to the standard of a fact. No doubt carburet of manganese enters into combination with the iron, producing a very improved steel, and there is the same result as regards the eventual product, if the elements of the carburet be put with the iron into the pot. On the last trial this was placed beyond speculation and shown to be a scientific fact. The experiment was tried by putting carburet of manganese and iron into one crucible, and oxide of manganese and carbonaceous matter and iron into another. The result was the same. These elements of carburet were then put without iron into one crucible, and they were put with iron into another. In the first, carburet of manganese was produced; in the second, the improved steel, but not a trace of the carburet remained. In fact, it is the combination of the carburet of manganese with the iron which produces the steel, as was shown at the trial. The question of intention has nothing to do with a civil injury. Why is an ignorant man to be in a better position than an educated one? If a man, through ignorance, infringes a patent, he is liable. *Stead v. Anderson*, 11 Jur. 878.

[*ALDERSON, B.* Intention has nothing to do with the question. To use a well-known equivalent is clearly an infringement; but to say that if a person discovers an equivalent, and uses it, he thereby infringes a patent, will be to check scientific discovery.]

The principle involved in this inquiry is one of considerable impor-

tance. In all processes of a chemical nature, the person describing it speaks of it as a chemical compound. Heat is known to be almost invariably the means of effecting combination. If he speaks of a salt, known to be a combination of acid and earthy base, would it be tolerated that a person should then use the elements?

[CROMPTON, J. They make it in the pot, and you out of it; that is very like a direct infringement.]

T. Jones, (*Deighton* with him), for the defendant. The question is, whether there was evidence to go to the jury of an infringement. It may be admitted that there is no difference between a direct and indirect infringement, but the infringement here is a mere matter of theory and speculation. It is a theory that carburet of manganese is first formed in the crucible, and then united with the iron. The charge against the defendant is, that he has done that from which it may be inferred or speculated that he has infringed the patent; or, in other words, he is charged with doing that which is possibly wrongful. If the jury had found this to be true, the nature of the truth so found would be too doubtful to amount to a legal fact.

[COLERIDGE, J. But surely it might be found as a fact by the jury.]

But it lies on the plaintiff to show that the defendant has done a wrongful act. Here the wrong is of necessity speculative. Chemists say, when these elements are introduced into the pot, that they form, according to their notion, a certain combination. The defendant may be taken to entertain a different opinion. He may think that the carburet is not formed before the steel. Upon the evidence it is doubtful.

[ALDERSON, B. Suppose it is discovered that carburet of manganese and iron make good steel, and that is well known, and it is also known that oxide of manganese and carbonaceous matter form carburet of manganese, and then a person discovers that by a different mode of mixing them with iron he can produce steel in an improved and cheaper form; is this a discovery or an infringement? It is certainly a very important question.]

Until it is shown that the elements do unite, there is no fact of which, in law, the plaintiff can complain. The patent is distinctly for the use of carburet of manganese, and does not glance at the use of the elements thereof, or any thing else.

[WIGHTMAN, J. Do you use carburet of manganese to make iron into steel?]

No. Ours is a new discovery; the plaintiff discovered the use of carburet of manganese, but not the use of oxide of manganese and carbon. When he took out his patent he did not know, what we have since discovered, that oxide of manganese and carbonaceous matter thrown into the pot with iron produced the same result. The material called carburet of manganese is worth 78*l.* a ton; the combination of carbonaceous matter and oxide of manganese is worth 7*l.* a ton. The plaintiff did not know, when he took out his patent, that the latter cheap substance would answer as well as the former, but now seeks to exclude the public from the use of the cheaper material for the period of his patent. He says it is the same thing, although

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so different in price. The difference is not merely in the way of making carburet, but of making steel.

[ALDERSON, B. It is clear that the same result is produced; but is not this a discovery? It is true that you may not use a known chemical equivalent; but if not known, how is it? Was it known, before the experiments were tried, that the three ingredients mixed would produce the steel? The opinions of scientific men amount to actual knowledge.]

The plaintiff himself, did not know it, otherwise his specification would not be an honest one, which it must be presumed to be. The real question is, whether we make the cast steel in the same way. The manner and form of making it is of the essence of the patent in this case. *Barber v. Grace*, 17 Law J. Rep. (N. S.) Exch. 122.

[ALDERSON, B. If you do the same thing, it is an infringement; so, if there be a colorable evasion, as by using a known equivalent. It does not follow, because chemists have now made the discovery, that therefore there is an infringement. The defendant must have been told by the specification what to do; but can that have been the case if it was not then known that this combination would form steel?]

A. J. E. Cockburn, in reply. A party who takes out a patent may not know the full extent of the invention; but no one is entitled to use it merely because he can adopt cheaper materials. He has no right to ingraft that discovery upon the former, or to build upon the former foundation. He has no right to say, "because I have improved your process, therefore your patent fails."

[ALDERSON, B. Suppose that the iron was rendered twenty times harder by the use of coal-tar, then it would be a discovery. It is true that you cannot, in mechanical inventions, use any process up to a certain point, but it may be different in chemical discoveries.]

Cur. adv. vult.

June 21. There being a difference of opinion, their lordships now delivered their judgments *seriatim*.

CROMPTON, J. This was an action for an infringement of a patent. The only question which is now material to be considered arose at the trial on the plea of not guilty; and the learned judge who tried the cause directed the jury, according to the decision of the Court of Exchequer, in a previous case between the same parties, that there was no evidence of infringement. A bill of exceptions was tendered against this direction, and we have now to consider whether there was any evidence of infringement which ought to have been submitted to the jury. For present purposes, we must assume that the invention patented was novel and useful; and the only question is, whether there was any evidence of infringement to go to the jury. It will be first necessary to see of what the invention consists. The patentee, after mentioning other inventions, which are not material, declares his invention to be, the use of carburet of manganese in any

process whereby iron is converted into cast steel. In a subsequent part of his specification he states what that operation is as follows: [His lordship read the plaintiff's description of his process.]

He states his claim, with reference to this invention, to be, the employment of carburet of manganese in preparing an improved cast steel. The two substances are to be placed together, forming (as proved by the evidence) alloy. This being the invention, one mode of carrying it out is particularized in that part of the specification in which the patentee specifies his *modus operandi*, and shows how he brings the two substances together, by introducing them into the same crucible. It is important to distinguish between the invention and the particular mode of working as described in the patent. There may be other modes than that pointed out by the patentee, of bringing the two substances together, which I apprehend to be an infringement of the patent, if they involved the use of carburet of manganese in the process of the conversion of iron into cast steel. The question is, whether what the defendant was proved to have done was not evidence of the use of carburet of manganese in the process of the conversion of iron into cast steel, although the operation was carried on in an improved mode, different from that described in the specification, and originally adopted by the plaintiff.

It appeared from the evidence that the plaintiff had first worked his patent by preparing the carburet of manganese from coal tar and oxide of manganese, and by then using the carburet so prepared, in the process of converting the iron into steel, in the manner described in the specification. He afterwards found that the same advantage was attained by taking oxide of manganese and coal tar, and putting them into the crucible in which the steel was melted; and witnesses in the employ of the plaintiff stated that he discovered that the using the carburet in the way I have described would answer the same purpose as making the carburet first. Strong evidence was given, by several scientific witnesses, that when the coal tar and the oxide of manganese were put into the crucible, a carburet of manganese was formed from them before the melting of the steel. They said that the carburet of manganese would be first formed, and immediately ally itself with the steel, and that the carburet would be formed at a lower temperature than that at which steel was melted; and they said in this way, when the carburet of manganese was employed in the manufacture of steel, it was an improved process. It appeared that the plaintiff had been in the habit of making up coal tar and manganese into packets, to be used in the new method. Some of these packets had been supplied by him to the defendant. The defendant was admitted to have manufactured cast steel, by using the oxide of manganese and carbonaceous matter introduced into the pot at the same moment with the iron. I think that this was evidence of using carburet of manganese in the process of converting iron into steel, and was evidence of a distinct infringement of the patent. It was a neater mode of carrying out the invention, by making the carburet in the crucible, instead of preparing it out of the crucible, and then introducing the carburet and

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iron into the crucible together; and in both operations the two substances are brought together, and the alloy is formed.

The question does not seem to be one of imitation, or of equivalent, but whether there is not evidence of the direct use of the carburet for the purpose of manufacture, though in a neater mode than that described in the specification. I do not agree with the suggestion that the invention was the putting the two substances in the crucible together in the exact manner pointed out by the plaintiff; but I think that the discovery claimed is the use of the carburet in the manufacture, and that it is not limited to the mode of working mentioned in the specification, which I think the plaintiff gives merely as a means of working his invention. The discovery of the new mode of making the carburet in the pot, in the course of the process, so as to be ready to ally with the steel in a subsequent part of the process, may have been a discovery and improvement on the plaintiff's invention, for which a patent might, perhaps, have been taken out; and if taken out by a stranger, the plaintiff could not have used the new method without infringing the patent for the improvement. On the other hand, the new method could not, in such case, have been carried on without infringing the plaintiff's patent, if, as I think, it was an improved and neater mode of bringing the two substances together, being a use of carburet, in the state of carburet, in the manufacture of steel.

I do not attribute any weight to the fact of the plaintiff himself being the discoverer of the new mode, or of the defendant having had it communicated to him by the plaintiff. However much these facts might affect the moral justice of the case, they do not seem to me to alter the law. If the new plan was a distinct invention, the defendant might have used it, whoever was the inventor. If, on the other hand, it was the use of carburet in the process of manufacture, it would be an infringement of the plaintiff's patent, even if the defendant himself had invented the improvement. I think there was abundant evidence from which the jury might infer, that in the new method the carburet was first formed in the crucible, from the materials, so as to be in the distinct state of carburet before the use of it in the manufacture of steel commenced, and that after its formation it was used as a carburet of manganese in the process of converting the iron into steel; and I think that, from such a state of facts it was competent for the jury to find that the patent had been infringed by the defendant. I think that the judgment should be reversed, and a *venire de novo* awarded.

PLATT, B. This was an action on the case, charging the defendant with an infringement of the plaintiff's patent; and on the issue joined on the plea of not guilty, the learned judge directed the jury at the trial, that the matters deposed to by the plaintiff's witnesses were not evidence of that infringement. The plaintiff having excepted to that direction, and brought his writ of error, the question arises whether, on the matter adduced in support of the plaintiff's case, on the trial, there was such evidence. It appeared that the plaintiff's

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patent was for an improvement in the manufacture of steel, by the use of carburet of manganese in the process of converting iron into that metal. By the specification, he claimed, as part of the invention, the use of carburet of manganese in any process whereby iron was converted into cast steel, and he describes the mode by which he obtained fine cast steel from simple iron, by the use of carburet of manganese. It was admitted at the trial between the plaintiff and the defendant, that since the date of the patent the defendant had manufactured cast steel by using oxide of manganese and carbonaceous matter, introduced into the melting pot at the same moment with the iron; the three ingredients, oxide of manganese, carbonaceous matter, and iron, being, however, separate and apart, and not in combination with either of the others.

It is also admitted, that since the date of the patent the defendant had manufactured cast steel by using only, I think, oxide of manganese and highly carbonized steel, introduced separately into the pot at the same time; and the testimony of chemists at the trial tended to show, that in each of these two processes carburet of manganese would be formed, and would become the active means of effecting the improved manufacture. Surely, whether the carburet, or its constituent parts separately, are put into the melting pot, could not make any difference, if those parts afterwards combined, and in their combined state acted in the same manner on the subject of the manufacture. By the defendant's selection of substances, which he put into the melting pot, he collected together oxygen, carbon, and manganese. The relative affinities sufficed to lead to the natural expectation that they would, on the application of the proper heat, combine, and in that combination form the carburet required. This may constitute a different manner of manufacturing carburet of manganese; but, however manufactured, if the defendant used it in the conversion of iron into cast steel, he, in my judgment, infringed the patent. Whether the chemical testimony was credible or not is not a matter for our consideration. We are required to consider and determine whether, coupled with the admissions on the trial, it was evidence, and evidence to be left to the jury, of the defendant having used carburet of manganese in the process for the conversion of iron into cast steel. I think it was, that the ruling of the learned judge was incorrect, and that the *venire de novo* should be awarded.

ERLE, J. In this case the question is, whether there was any evidence of an infringement of the plaintiff's patent "for the use of carburet of manganese in the process of converting iron into cast steel;" and there was evidence that the defendant, by heating the elements of carburet of manganese with iron, formed first the carburet, and then cast steel. If this be true, the defendant would, in my judgment, be guilty of a direct infringement. But assuming this to be doubtful, there was also evidence that he had indirectly infringed this patent for the use of a substance in a process, by the use of a known chemical equivalent for that substance in that process. At the time of the patent the patentee made the carburet by heating the carbon

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and manganese till it was formed, and then heated the carburet with iron to form the cast steel. He afterwards discovered, that if the elements of the carburet were heated with the iron, the same result would be obtained, and one heating would be saved. He communicated the effect of this discovery to the defendant by selling to him the packet containing the elements of the carburet to be so used. The patentee knew at the time of the patent the elements of which he formed the carburet, and from that knowledge was induced to use those as equivalent to the substance mentioned in the specification. There is thus some evidence that the defendant infringed the patent by the use of a chemical equivalent for the patented substance, known to be so at the time of the patent. But I am further of opinion that a patent for the use of a substance in a process is infringed by the use of a chemical equivalent for that substance, known to be so at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colorable variation therefrom. Taking the instance put in the argument of this case in the Exchequer, if a patent was for the use of soda in a process, and by subsequent analysis sodium and oxygen were discovered to be the elements of soda, the use of sodium and oxygen in the patented process, for the purpose of being equivalent to soda in that process, would appear to me to be an infringement, though the analysis of soda was subsequent to the patent. Upon these grounds it appears to me that there ought to be a *venire de novo*.

WIGHTMAN, J.¹ I cannot come to the conclusion that there was no evidence for the jury, in this case, that the defendant in the action, had infringed the plaintiff's patent; and if there is any, the plaintiff is entitled to judgment upon this bill of exceptions for a *venire de novo*. The action was on the case for infringing a patent for 'certain improvements in the manufacture of steel.' The defendant pleaded not guilty, and several other pleas; but the question arose upon the plea of not guilty. The plaintiff, in his specification, declared that one of his improvements was, 'in the use of carburet of manganese in any process whereby iron is converted into cast steel;' and he claims that as his invention. It appears by the evidence that the use of the carburet of manganese in the manufacture of steel was unknown before the plaintiff's invention, and that it was a most important improvement. In the specification the plaintiff states the mode in which he applies the carburet of manganese to the iron or steel, but states expressly that all he claims as his invention is the use of the carburet in any process for the conversion of iron into cast steel. It appears by the evidence that the carburet may be applied in three ways:—One, by making the carburet first, and then introducing it into the melting pot with the iron or steel to which it is to be applied; and this is the mode stated in the specification. Another, by putting the ingredients which are to form the carburet into the pot at the same time with the iron or steel, in which case the carburet is formed

¹ His lordship was absent through illness, but his judgment was read by COLERIDGE, J.

in the pot before it acts upon the iron or steel; and this mode was adopted by the plaintiff subsequently to the patent specified. And, thirdly, by putting oxide of manganese into the pot with steel so highly carbonized that at a high temperature carburet of manganese would be formed, and produce the same effect upon the steel as if either of the other processes were used.

It was admitted that the defendant had adopted both of the last modes of using carburet of manganese in the manufacture of steel. In each of the three modes the same materials are used, and the effect is produced by the same means, namely, the action of carburet of manganese upon iron. The materials are the same in each — iron, manganese, and carbonaceous matter, which two latter must unite before they act upon the iron; and in all the three the union of the carbon and manganese takes place before the united substance acts upon the iron. The mode adopted by the defendant is not by using chemical equivalents; the materials and combinations are the same with those of the plaintiff, with this difference, that his carburet is formed in the same pot in which the iron is; whereas, by the plaintiff's specification, the carburet is formed before it is put into the pot; but in both the carburet must be formed before it can act upon the iron. By the mode adopted by the defendant, which indeed the plaintiff himself had adopted, one heating suffices for the whole process; whereas, by the mode mentioned in the specification, the oxide of manganese and carbon must first be converted into carburet by the action of one fire, and then there must be another to produce the action of the carburet upon the iron. The plaintiff's patent, however, is not for the mode of preparing the carburet of manganese, but for the use of it in any process whereby iron is converted into cast steel. The process by which the defendant makes his carburet may be an improvement upon that mentioned in the specification, but when made he uses it for the same purpose and with the same effect as the plaintiff. Both the plaintiff and the defendant operate upon the iron, and produce the same effect upon it, by the same agent, namely, carburet of manganese; and it is for the operation of that agent upon iron in the process of converting it into steel that the plaintiff has taken out his patent. I think, therefore, that there was evidence for the jury that the defendant had infringed the plaintiff's patent, and that there should be a *venire de novo*.

COLERIDGE, J. The only question in this case is, whether there was any evidence to go to the jury of an infringement of the plaintiff's patent; and this must be considered on the assumption that the plaintiff's specification was unexceptionable, a condition which it will be found very important to bear in mind in the examination of the evidence. Limiting myself to all that is in question in the present case, I may state that the specification, to be perfect, must be taken to specify impliedly all the chemical equivalents to the chemical means expressly stated for producing the promised result, which were, at the time of specifying, known to ordinarily skilled chemists, or to the patentee himself. The latter of these seems

to me as necessary as the former. If the inventor of an alleged discovery, knowing of two equivalent agents for effecting his end, could, by the disclosure of one, preclude the public from the benefit of the other, he might, for his own profit, force upon the public an expensive and difficult process, keeping back a cheap and simple one; which would be directly contrary to the good faith required from every patentee in his communication to the public. Now, the plaintiff thus describes the process which he claims:—"I do it by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." He then declares that he does not claim the mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention, but only the use of carburet of manganese in any process for the conversion of iron into cast steel; and in the final enumeration of his claims he repeats, "I claim the employment of carburet of manganese in preparing an improved cast steel." This being the specification and claim, it appears from the evidence that the same result may be produced as certainly, and far more cheaply, by substituting for the carburet of manganese oxide of manganese and coal-tar, (a carbonaceous matter), which, being thrown into the crucible with the iron, there is strong ground for believing, form carburet of manganese before the iron is in a state of fusion, and before, therefore, any mixture of the two takes place. The difference is, that, instead of the formed composite substance being thrown into the crucible in certain proportions to the iron and carbonaceous matter, the ingredients of each substance are introduced, which in one and the same process, but in an earlier stage of it, form the composite, which then applies itself to the iron and produces the desired result.

There can be no doubt then, I think, that an equivalent in this case, if that equivalent was known, at the date of the specification, to the plaintiff or ordinary chemists—those, I mean, who would bring to the reading of the specification such knowledge as must be presumed in those to whom it must be taken to be addressed—is within the specification, and the use of it is an infringement; if not, a contrary conclusion follows, and the use of it is an improvement in virtue of a new discovery. And the knowledge I speak of is, of course, not the knowing what were the component parts of carburet of manganese, but the knowledge that the component parts thus applied were equivalent to the thing itself, applied according to the specification for producing the desired result. This limitation seems to me required by common sense and common practice; unless it be imposed, I see no means of knowing whether the latter process is or is not within the specification; and unless I know that, I have no means of distinguishing improvement from infringement. Whether the equivalent be in its nature near to or remote from the thing itself, seems to me, in principle, wholly immaterial; and equally so, that the one should be so nearly identical with the other as in themselves the component parts may be with the composite substance. The new conclusion

may be deducible from known and specified premises, and, in strict reasoning, therefore, involved in them; still he who first puts the premises side by side, and deduces the conclusion, is the inventor. Many of the greatest and most unquestioned discoveries reduce themselves into no more than this. Having applied these principles to a careful examination of the evidence, I cannot perceive that there was any to show either that chemists, or the plaintiff himself, at the date of the specification, had any knowledge of the equivalent which the defendant has used, though there is evidence that at a later period the defendant may have gained his knowledge from the plaintiff himself. I think, therefore, that the ruling of the learned judge at the trial was correct, and that judgment ought to be affirmed.

ALDERSON, B. The first question is, I think, what really is the invention described and claimed by the plaintiff in his specification. He describes the process thus:—"I do it," he says, "by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." And he adds, that he claims the use of carburet of manganese in any process for conversion of iron into steel. Now, we are aware that carburet of manganese was a well-known substance existing before the patent. As the specification describes it as being introduced into the crucible with the steel or iron, and as it is to be introduced at a given proportion of weight with the steel or iron, I do not myself see how any language could more accurately express, to those who read it, that the patentee really meant to take two existing substances, to weigh them, to take their definite proportions of weight, the one to the other, and then, introducing these definite proportions of carburet of manganese and of steel into the crucible, to proceed to melt them together. If the words can mean any thing else, it is quite out of my power to conceive it. And then, I think, if this be established, it follows that all that the patentee has claimed and specified is this which I have described. But I fully agree also, that, according to the due administration of the patent law, every specification is to be read as if by persons acquainted with the general facts of the mechanical or chemical science involved in such inventions. Thus, if a particular mechanical process is specified, and there are for some parts of it, as specified, other well-known mechanical equivalents, the specifying of those parts is, in truth, a specification of the well-known equivalents, also, to those whose general knowledge we refer to, namely, mechanics and readers of the specification; and so it is with chemical equivalents, also, in a specification to be read by chemists. But it may be that there are equivalents, mechanical or chemical existing, but previously unknown to ordinarily skilful mechanics or chemists. These are not included in the specification, but must be expressly stated therein. These are, in fact, new discoveries in themselves, wholly independent of the specification, which omits them, and for them there is no patent or specification at all. They may be used by all persons without infringing the patent. These are the

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principles upon which I hold that this question must be determined, and which we must look to and be governed by when we answer the question here, whether there is any evidence of the infringement of this patent by the defendant; and I propose, therefore, referring myself to them, to consider the evidence which is stated in this record.

It is clear that there is no evidence that the defendant melted carburet of manganese with broken steel or iron, by taking each of those substances, existing in a separate state, and putting them into a crucible, and then applying heat. He has not, therefore, directly and in terms infringed the patent. But I have before shown that an infringement may be if a defendant uses a known chemical or mechanical substitute equivalent to the very thing pointed out; for, the equivalent being known, and a part of the general knowledge of the world, he who, by his specification, describes the ingredients which he uses, describes impliedly also all their known equivalents, and so does, in fact, communicate to the world, by his specification, the knowledge of the invention; and on this knowledge, thus expressly or impliedly communicated, he who afterwards infringes the patent really acts. But this depends upon the equivalent being a known one before. If the equivalent be not before known, he who discovers *de novo* the equivalent (if it be better than the original for which it is the equivalent) has, by the use of the equivalent, improved upon, not infringed, the original invention. That is the case here; the carburet of manganese is to be taken and melted with the broken steel or iron. This is the invention — an improved steel is the result. Now, carburet of manganese is an expensive ingredient, produced by an additional process, from oxide of manganese and carbon. There is no evidence that the oxide of manganese and carbon were known to be at the time of this specification — which time, and not the time of the use, is the material time to look at — exactly, and under all circumstances, an equivalent in chemistry for carburet of manganese. They did produce it, but only after being subjected to a special process, which was expensive. But it is now found, that, by putting these ingredients with broken steel or iron into a crucible, they produce the same effects, when melted, as the carburet of manganese with broken steel or iron did before; and, this fact existing, a scientific reason is to be found for it. It is said now, therefore, that these ingredients, melted together at a lower heat than will melt steel or iron, do in the crucible first form carburet of manganese, and then, there being carburet of manganese formed and existing in the crucible, first with unmelted steel or iron, the subsequent melting of those two ingredients together forms the good steel. It seems clear that this order of formation in the crucible is of the essence as to the success of the operation, and that this order of formation, under these circumstances, was utterly unknown at the time of the patent and specification. I agree that there is now abundant evidence to show that these materials, thus treated, do form an equivalent, chemically, for the carburet of manganese, though the evidence fails altogether as to the existence of the two substances in definite proportions in the crucible, such as are mentioned in the specification. But I can find no evidence what-

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ever on the record, that at the time of the plaintiff's patent and specification, this was well known to persons ordinarily skilled in chemistry; and unless this fact be added, I think there is no evidence for the jury of an infringement of that peculiar process which, by his specification, the plaintiff has claimed to be his invention. For the specification, by which he does state his invention, does not communicate, if read by any ordinarily skilful chemist of that day, the knowledge, that to melt together in a crucible carbon, oxide of manganese, and broken steel or iron, is really the same thing as to melt in a crucible carburet of manganese with broken steel or iron. The plaintiff did not then know it, nor did any one else then know it. If they know it now, it is in consequence of a new discovery alone, for which no patent has been taken out, and no specification enrolled. I apprehend nothing is an infringement now which would not have been one immediately after the specification was enrolled. The knowledge of the equivalents must be the knowledge the world had before these experiments, now called infringements, were first made. I think the judgment should be affirmed; but as the majority of the court are of a different opinion, the judgment must be reversed, and a *venire de novo* awarded.

Judgment accordingly.

FOSTER v. CRABB.¹

June 8, 1852.

Pleading — Detinue — Special Traverse.

In detinue for a deed, by which property was assigned to C. and S., on trusts for securing an annuity to the plaintiff, the defendant pleaded that C. and S., took possession of, and had a right to, the deed; that before the plaintiff had possession of the deed, S. obtained possession of it, and C. died; and that afterwards S. delivered the deed to the defendant to keep, and that the defendant detained the deed from the plaintiff on behalf of S., and by his authority. The plaintiff replied, that, before the defendant was possessed of the deed, and after the death of C., one G., and not S., was possessed of the deed, and that G. delivered it to the defendant by the authority of the plaintiff, and that the defendant hath always held and still holds the same under such authority; without this, that S. delivered the deed to the defendant: —

Held, on special demurrer, that the replication was good, the traverse that S. delivered the deed to the defendant being a material traverse.

Held also, that the inducement to the special traverse was not bad for saying that the defendant "still holds" the deed by the plaintiff's authority.

THIS was the same action as *Foster v. Crabb*, 16 Jur. 835; s. c. 11 Eng. Rep. 521, to which reference is made for the pleadings. After the judgment of the court had been delivered as above reported, the plaintiff obtained leave to amend his replication; and he accordingly amended the same by replying to the defendant's plea, that before the defendant was possessed of the said deed in the said plea mentioned, and

¹ 16 Jur. 836; 21 Law J. Rep. (N. S.) C. P. 209.

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after the death of the said David Colombine, one George Green, and not the said Edward Bridges Swindall was possessed of the said deed, and being so possessed thereof, the said George Green delivered the same to the defendant, at the request and by the authority of the plaintiff; and the defendant, at the request and by the authority and on behalf of the plaintiff, then received the said deed of and from the said George Green, and hath always held and still holds the same under and by virtue of such last-mentioned request and authority; without this, that the said Edward Bridges Swindall delivered the said deed to the defendant, in manner and form as in the said last plea alleged. Conclusion to the country. Special demurrer thereto, on the grounds (amongst others) that the special traverse was an immaterial traverse; that the inducement to the traverse was bad, and inconsistent with the declaration, as, if the defendant always held the deed by the authority of the plaintiff, the plaintiff had no ground for his action; that the replication was double, in setting up a bailment of the deed on behalf of the plaintiff to the defendant, &c., and also a denial of the bailment by Swindall to the defendant. •

J. Brown, in support of the demurrer. The replication is bad. The plea says that the defendant detains the deed by the authority of Swindall, and this is not answered by the replication. The traverse does not go far enough. Com. Dig. tit. "Pleader," Q. 6. The allegation of delivery by Green to the defendant is only matter of inducement, and not traversable. *Clopman v. White*, 7 C. B. 43. If the plaintiff intended to rely upon it, as preventing the defendant from setting up a *jus tertii*, it ought to have been specially pleaded by way of estoppel. *Freeman v. Cook*, 2 Exch. 654; *Saunders v. Coleman*, 4 Man. & G. 209; *Veale v. Warner*, 1 Saund. 325, note 4; *Plummer v. Woodbourne*, 4 B. & Cr. 625. The court cannot assume, from any thing upon the record, in what way the deed came into the defendant's hands. Whether he found it, or obtained it in any other way, it appears from the plea, and which is not denied, that Swindall authorized him to detain it, and this is sufficient in this action. (See Com. Dig., tit. "Attorney," C. 1). If Swindall may detain the deed, of course the defendant may also detain the deed, as deriving his authority from Swindall. The inducement is also open to the objection, that it alleges that the defendant holds by the plaintiff's authority, without limiting that authority to the time of action brought; and there is also this further objection, that there is no demand of redelivery alleged.

Gray, contra. It is material from whom the defendant got the deed. There are three distinct allegations in the plea—first, that Swindall got the deed into his possession; secondly, that he delivered it to the defendant; and, thirdly, that the defendant retains the deed by the authority of Swindall. It is essential, therefore, to the validity of the plea, that Swindall delivered the deed to the defendant. Strike out the allegation in the plea as to the delivery by Swindall, and it is not sufficient; for the two other allegations are connected only by

means of this allegation. It is consistent with the allegation that Swindall had possession of the deed, that by some means or other it got out of his possession, and that the plaintiff obtained it, and afterwards that the plaintiff delivered it to the defendant to keep for him, and that the defendant had so received it. In such a case the plaintiff would have a good right of action against the defendant for refusing to return the deed, and it would be no answer to say that Swindall authorized him to retain it. As far as the plaintiff and defendant are concerned, it is only a case of delivery by the plaintiff to the defendant, to be redelivered on request.

[MAULE, J. Suppose a banker to have possession of a deed belonging to two co-tenants, and each of them to say to him, "Do not give it to the other," then he would have a defence against both if this plea is good.]

Yes. Here the traverse is of itself sufficient, independent of the introductory matter. Provided the traverse be a material traverse, the introductory matter need not be material; but if the traverse be not material, then the introductory matter must be material.

[JERVIS, C. J. But on special demurrer the sufficiency of the inducement must be shown.]

It is submitted that the introductory matter is sufficient. This is a plea in confession and avoidance, and admits the plaintiff's title as stated in the declaration; therefore, in the replication it was not necessary, in the introductory matter, to state the title of the plaintiff, as that had been admitted by the plea. As to there being no demand, the authority to keep would continue, and the defence would have been *non detinet*; but with respect to the want of an allegation in the replication of such demand, that is not pointed out in the special demurrer. Then, with regard to the objection that the replication does not limit the authority to detain the deed to the time of the action being brought, the object of the replication is to show that the defendant did not get the deed by the authority he alleges in his plea; and it accordingly shows that the defendant obtained possession of it by the authority of the plaintiff; but that does not state that the defendant still detains it by such authority

J. Brown replied.

JERVIS, C. J. It seems to me that the plaintiff is entitled to the judgment of the court in this case. The object of a special traverse is correctly stated in *Stephens on Pleading*. The plaintiff may, by it, present a traverse on which an issue in fact may be taken, and may expend it in the inducement, and thus raise an issue in law. But both must be sufficient. If a party choose, he may present a material allegation in his plea, but in either case, the other party has a right to have the special traverse, and inducement presented to him in a light on which he might have taken issue. Here the defendant might have taken an issue in fact on the special traverse, or demurred generally, or he might have traversed the inducement. But the defendant has chosen to demur on the question as to the validity of the

 Roberts v. Bethell.

special traverse; and on all the points he has taken, I think the plaintiff is entitled to judgment. With respect to the traverse, if you strike out of the plea the allegation of bailment by Swindall, the plea would be bad; for, as it is a plea in confession and avoidance, it admits the plaintiff's title, unless the defendant can displace it. The plea, in effect, states, "I displace your right as alleged in the declaration, because Swindall delivered the deed to one." The plaintiff replies, "No; I delivered the deed to you." That is material, and a subsequent direction by Swindall to keep it would not do, for Swindall's possession of the deed at one time is no matter if the defendant did not get it from him. Then, as to the inducement, two questions were raised on that matter—first, that there was no allegation of a demand of redelivery; that is not pointed out in the special demurrer; secondly, that the inducement says that the defendant holds the deed by the authority of the plaintiff, without saying that he holds it down to the time of action brought. Now, the allegation is, that Green delivered the deed to the defendant at the request and by the authority of the plaintiff, and that the defendant then received and held the same at the request and by the authority of the plaintiff, and still holds by the plaintiff's authority. This allegation of bailment by the plaintiff merely means that the defendant had no other than the plaintiff's authority, not that that authority is continuing. The inducement is consistent with the traverse, and judgment must be for the plaintiff.

MAULE, CRESSWELL, and TALFOURD, JJ., concurred.

Judgment for the plaintiff.

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ROBERTS V. BETHELL.¹

November 16, 1852.

Evidence — Bill of Exchange — Acceptance within reasonable Time of Drawing.

The bare production of a bill of exchange, with formal proof of the writing to the acceptance, is *prima facie* evidence that the bill was accepted during its currency, and within a reasonable time of the date it bears, such being the regular and usual course of business. What is a reasonable time depends on the relative places of abode of the parties to the bill.

Action by indorsee against acceptor of a bill at four months' date. Pleas, that the defendant did not accept, and that he was an infant when he accepted. Proof, that the accept-

¹ 16 Jur. 1087.

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ance to the bill was the defendant's writing, that he came of age one day before the maturity of the bill, and resided in the same town as the drawer and indorser: —

Held, evidence for the jury, from which they might infer that the bill was accepted during the defendant's minority.

PROMISES. The declaration alleged that one William Miller, on the 2d November, 1850, made his bill of exchange in writing, and directed the same to the defendant, and thereby required him to pay to the said William Miller, or order, the sum of 90*l.*, for value received, three months after the date thereof, (which period had elapsed, and the said bill had become due, before the commencement of this suit), and the defendant then accepted the said bill, and the said William Miller then indorsed it to the plaintiff, of all which the defendant then had notice, and then promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his said acceptance thereof. There were similar counts on four bills of the date of the 23d November, 1852, payable at one month after date, and on one of the 9th November, 1850, payable four months after date. Pleas: first, that the defendant did not accept any of the bills; secondly, that he was an infant when he accepted each of them. Replication, special traverse that the defendant was of full age when he accepted the bills; without this, that he accepted the bills, or any of them, whilst he was within the age of twenty-one years. At the trial, before Williams, J., at the sittings for Middlesex in Trinity term, the plaintiff proved his case by putting in the several bills of exchange, which corresponded with the respective dates, &c., stated in the declaration, and by proving the acceptances on them to be in the defendant's handwriting. The defendant, to support his plea that he was an infant at the time of accepting the bills, proved that he came of age on the 11th March, 1851. It was also in evidence that the parties to the bills all resided in London. The learned judge left it to the jury to say whether they would infer from the above evidence that the defendant's second plea was proved; and they returned a verdict for the defendant, leave being reserved to the plaintiff to move to enter it for him.

Byles, Serg., having obtained a rule accordingly,

Nov. 16. *E. James*, Q. C., and *Fortescue*, showed cause. The rule was moved on the ground that it was incumbent on the defendant to prove by direct evidence that he accepted the bills during his infancy; but it is submitted that he gave evidence from which the jury might well infer this. The evidence consisted of the bills, with the defendant's acceptance on each, and the fact that the defendant came of age on the 11th March, 1851. Now, all the bills, except one, became due before that: indeed, several weeks before; and that of the 9th November, payable four months after date, became due, including the three days of grace, on the 12th March, one day after the plaintiff had obtained his majority. Surely, in the absence of evidence to the contrary, the reasonable and proper inference was, that

the bills were accepted before the defendant came of age; in other words, the learned judge was right in leaving the evidence to the jury, and they in finding as they did. *Harrison v. Clifton*, 17 Law J. Rep. (N. S.) Exch. 233, was cited by the plaintiff's counsel as an authority in his favor; but that case is easily distinguished from the present, for in that case the bill was not produced, as was observed by Parke, B., in *Levy v. Bulkeley*, 14 Law T. 378. The latter case is directly in point for the defendant. There, the defendant came of age three months after the bill was drawn, and one month before its maturity, and it was held that the bill was evidence to go to the jury that the acceptance was made during his minority.

[MAULE, J. It is a matter of every-day practice that the only evidence in an action against the acceptor of a bill of exchange is the production of the bill, and the proof of the defendant's handwriting to the acceptance. Now, the only way that this can be considered evidence of acceptance before action is on the principle that it is the ordinary course of business to present and accept bills during their currency, and within a reasonable time of the drawing; so that in the absence of evidence to the contrary, it may be inferred, from the bare production of the instrument accepted, and proof of the defendant's handwriting, that it was accepted within a reasonable time of the drawing, and therefore before action brought.]

That, then, is a conclusive argument, by analogy, for the defendant. In the case of *Anderson v. Weston*, 6 Bing. N. C. 296, it was held, that *prima facie* a bill of exchange must be taken to have been issued at the time it bears date, and that the jury might infer, from the circumstance of the drawers being the payees and indorsers of the bill, that the indorsement was made soon after the drawing, and before a certain event, namely, notice of dissolution of the partnership between the drawers. Now, that is a stronger case than the present, because it became necessary there to show that the indorsement took place before the notice of dissolution of the partnership; and there was no evidence of this except the bill itself, and the date upon it. The presumption must always be that a bill was accepted before its maturity. "If there be an issue raised as to the time when an acceptance, not dated, was given, whether before or after the maturity of the bill, on whom will the burthen of proof lie? It is conceived, on the party alleging the bill to have been accepted after it was due." Byles on Bills, 146, note *y*. If the acceptance were after the bill became due, a different allegation would have been required in the declaration. *Jackson v. Pigott*, 1 Ld. Raym. 364; *Mutford v. Walcott*, Ibid. 574. The defendant need not go so far as to say that there would be such a variance between the proof and declaration as to require an amendment; but the plaintiff must not make what he now contends is a false statement on his declaration, and then call upon the defendant to prove it.

[They also cited *Brown v. Harraden*, 4 T. R. 148; *Billing v. Devaux*, 3 Man. & G. 565; and *Christie v. Peart*, 7 M. & W. 491.]

[MAULE, J. The question is as to what is a reasonable time after the drawing for the acceptance of a bill; and where the parties are

living in the same town, this would be very soon after. The evidence, then, is sufficient as to the bill due on the 12th March.]

Byles, Serg., and *Huddleston*, in support of the rule. As to the difficulty against the contention of the plaintiff, suggested by Maule, J., namely, that in almost every case of an action on a bill of exchange the evidence given of acceptance before action brought is merely the proof of the handwriting to the acceptance, it does not appear that the objection to the sufficiency of such evidence has ever been taken; at any rate, a distinction can be drawn in the present case from the form of issue. The defendant undertakes to prove that he accepted the bills when he was an infant. Now, in the absence of any proof one way or the other, the presumption must surely be against the party who has to prove the issue, and who has also full knowledge of the circumstances and time of the acceptance. The principle is thus laid down in *Starkie's Evidence*, 363, 2d ed.:—"It is a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact of which he is cognizant;" which explains all the cases cited on the other side. In *Levy v. Bulkeley*, *Levy*, who was the drawer, knew, equally as well as *Bulkeley*, who was the acceptor, and at what time the bill was accepted; and there was, therefore, no presumption either against or in favor of one party more than the other. In *Anderson v. Weston* the defendants were the drawers and indorsees, and the plaintiff a stranger to the circumstances; therefore the *onus* of proving that the drawing and indorsement were before the dissolution of the partnership lay on the defendants.

[MAULE, J. That argument assumes that there is no evidence here; on the contrary, the court think there is evidence in the bill itself.]

That it bears a certain date? But even the presumption that a bill is drawn on the day it bears date is subject to exceptions, as has been held in the case of a petitioning creditor's debt in bankruptcy. There are two cases cited in *Chitty's Precedents*, by Pearson, 330, note b. *Israel v. Argent*, and *Blyth v. Archbold*. In the latter, Lord Abinger is said to have ruled in the way we contend for. Lord Abinger says you must prove that when you accepted you were under age.

[MAULE, J. Those cases are loosely stated, but even granting they are correct, Lord Abinger does not say you must prove the precise day on which you accepted.]

In *Dickson v. Evans*, 6 T. R. 57, it was held, in an action by the assignees of a bankrupt, that the defendant could not set off cash notes payable to bearer, bearing date before the bankruptcy, without showing that they came into his hands before the bankruptcy. It is admitted that between third parties the presumption may be different, or in different issues; but here it is contended that the *onus* is upon the defendant to prove when he accepted the bill.

[MAULE, J. Suppose a witness had been called who had said that the bill was accepted before it became due, and the defendant had then shown that he came of age after the maturity of the bill, he would have proved his case. So, here, the evidence is the same,

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though less strong; it only differs in the quantity of proof. The plaintiff having given evidence on the traverse of the acceptance, that amounts to proof that the defendant accepted the bills before maturity; the defendant then adds proof that he came of age afterwards.]

That is so; but the presumption may be different on the two issues.

[MAULE, J. The evidence is the same, whatever the issue.]

All that has to be proved on the first issue is, that the bills were accepted before action brought; whether after or before maturity is immaterial.

[MAULE, J. Your argument seeks to infer that an acceptance was given after maturity, whereas the proper inference is that it was given before, *i. e.* in the regular and usual course of business.]

JERVIS, C. J. I think that this rule must be discharged. It is not denied on the part of the defendant, nor, indeed, could it be contended, but that the defendant must give proof that he was an infant when the bills were accepted: the simple question is, how this must be proved, or, in other words, whether there was any evidence of this for the jury. The fact of the defendant's infancy up to the maturity of the bills was clearly established; and the real question then arises whether the bare production of the bills accepted was any proof that the defendant accepted them during his infancy. In the course of the argument my brother Maule suggested a test of this from the circumstance that the common proof of the acceptance of a bill before action is the proof of the defendant's handwriting alone: in my opinion, the counsel for the plaintiff have not removed the doubt caused by this suggestion. Why is it that this proof is deemed sufficient? Because it is presumed that the acceptance was made during the currency of the bill, it being the ordinary course of business that a bill would be presented within a reasonable time after its drawing, and would be accepted on its presentation. But my brother Byles says, admitting this, the form of the issue in this case make a difference, and the defendant must give direct proof that he was an infant when he accepted the bills, and that the parties are different from those in the case put by my brother Maule. The fact of the parties on the issues being different may affect the amount and value of the proof in the two cases, but it does not deprive the instrument of all effect as evidence. It would be for the jury to say what value they would attach to the mere production of the instrument, and possibly it might be a strong topic to urge to them, that the party, in whose knowledge the time and circumstances of the acceptance were, had not given direct evidence of those circumstances. But I decide this case on the broad ground that we are to presume that a bill is accepted within a reasonable time of the date it bears. A party taking a bill must be presumed to have pursued the ordinary course, namely, to have applied to the drawer within a reasonable time, and the drawer to have accepted when applied to. We cannot make the opposite presumption, as we are called on by the plaintiff to do, that the bill was accepted after maturity; if that were so, the plaintiff

should have shown this in answer to the plea of infancy. This disposes of the five bills which became due before the defendant came of age; and the same principle applies to the sixth; for if the inference is, that a bill is accepted within a reasonable time of its date, this bill also must be inferred to have been accepted during the defendant's infancy, for a reasonable time expired before the three days of grace, and the defendant only came of age on the second of those days. Therefore, I think the verdict was right as to all six bills, and should not be disturbed.

MAULE, J. I am of the same opinion. This is a case in which the defendant undertook to prove that he was an infant at the time he accepted the bills; and the jury have found that he was. The question, therefore, is, was there any evidence to justify them in so finding? This has been treated as a case of presumption, but it is not really so. Presumption is, where a certain state of facts is, without any evidence, taken to be the existing state of facts. Here you cannot presume that the defendant was an infant when he accepted the bills; he has to prove it. He seeks to prove it by proving that the bills became due during the time he was an infant—at least, as to five out of the six; and with respect to the sixth, that he came of age on one of the three days of grace. The question is, do these facts, so given in evidence, amount to evidence that the defendant was under age when he accepted the bills? It is a well established principle, and is conceded by the plaintiff, that bills of exchange, and instruments of that kind, are presumed to have been issued on the day they bear date, (though frequently issued both before and after), with one exception in bankruptcy, that to prove a petitioner's debt, the date alone of a bill is not sufficient evidence; and this exception is founded on particular reasons of convenience applicable only to that particular case, which shows that in the absence of those particular reasons the general rule is proper and reasonable—one of those exceptions which may well be said to prove the rule. Why is this a general rule, founded on common reason? Because, ordinarily, instruments of this kind are made and issued on the day they bear date, or rather are dated when made and issued; and, therefore, the production of the instrument, bearing a particular date, is some evidence that it was made on that date, though not conclusive. Acceptances ordinarily are not dated; therefore there is nothing in the fact of the acceptance being there to prove the very date of its being made; and, perhaps, those loose notes cited from Chitty were cases in which it was sought to extend the effect of the date of the bills in evidence, to show that the bills were accepted on those very days. But the reason that induces the courts to presume bills to be made on the day of the date does not apply to the case of acceptances, because it is by no means the universal or general practice to accept bills on the day on which they are drawn. But although it is not usual to accept on the same day, it is usual to accept on some early opportunity after the drawing. It being naturally to the interest of the drawee to obtain a negotiable instrument as soon as pos-

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sible, he would apply to the drawer at the earliest opportunity, and on application the drawer would accept; therefore, the acceptance affords some evidence, though not that it took place on the very day of the drawing, that it took place soon after, within a reasonable time, regard being had to the relative local situation of the parties. Therefore, on the same foundation as rests the rule as to the date of a bill, rests the presumption that an acceptance took place before the maturity of the bill, and within a reasonable time of the drawing.

In the course of the argument I threw out an observation, which my brother Byles allowed had weight, that probably in 10,000 cases within all our memories a bill with an acceptance on it has been received as proof that it was accepted before action brought. It has not been, and cannot be, suggested, how this could be evidence in any other way than on the rule, and for the reasons I have given. The above observations apply to all the bills but one. With respect to that one, it has been shown that the limits for the accepting of a bill are, a reasonable time after its drawing, and that would clearly, in this case, be before the days of grace. Therefore, I think the evidence was duly admitted as to all the bills; this judgment being founded, though not in terms on express decisions, in which it has been held that the date is *prima facie* evidence of the time of making an instrument, yet on a principle not substantially different from those decisions. I think that the date of the bill is some evidence of the time about which it was accepted. I think, therefore, that the verdict was founded on evidence on which it was competent to the jury to find as they did.

WILLIAMS, J. I concur in thinking, for the reasons given by my lord and my brother Maule, that there was some evidence for the jury on which they might find a verdict for the defendant.

TALFOURD, J., concurred.

Rule discharged.

FREEMAN v. TRANCH.¹

June 9, 1852.

Practice — Substantial Justice — Jurisdiction of Court — Judgment Nunc pro tunc — Delay of Court — Of Parties.

The court cannot depart from a general rule of practice in order to do substantial justice in a particular case.

The court gives a party leave to enter judgment *nunc pro tunc* after the expiration of two terms, only when the delay has been the act of the court itself. Therefore, where the executrix of a plaintiff was unable to get probate of the will on account of a caveat entered in

¹ 21 Law J. Rep. (N. S.) C. P. 214; 16 Jur. 1141.

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the Ecclesiastical Court by the defendant for the purpose of delay, this court, though reluctantly, refused to give leave to enter judgment *nunc pro tunc* after the expiration of two terms.

DEBT. The cause was tried, at the Kent spring assizes, on the 17th of March, 1851, and a verdict was found for the plaintiff, subject to the award of an arbitrator.

The arbitrator published his award on the 28th of May, and directed that the verdict entered for the plaintiff should stand for a portion of the sum claimed, and that the costs of the reference should be paid by the defendant.

It appeared from the affidavit of the plaintiff's attorney that the plaintiff was anxious to take up the award, but was prevented from doing so by poverty; that on the 10th of November, the deponent, at the plaintiff's request, promised to advance the amount necessary for taking up the award, and proceeded to take steps necessary for that purpose. He then ascertained that the award had already been taken up by the defendant, of which no notice had been given to the plaintiff. Having bespoken a copy of the award, the plaintiff's attorney proceeded with it to the clerk who usually had the custody of the records for the Kent assizes, for the purpose of obtaining the *postea*. The clerk was unable to find the *postea* on that occasion; but on a second application, by appointment, on the 24th of November, the record was found, and the deponent bespoken the *postea*. On the 25th of November the plaintiff's attorney (the deponent) learned that the plaintiff had died on the 22d of November. On the 1st of December the deponent obtained the *postea*, and on the 2d he attended at the judgment office to sign judgment, when he was informed that he could not do so without leave of the court. On the 3d of December the will of the plaintiff, by which M. A. Freeman was appointed executrix, was taken to the Prerogative Court to be proved; but a *caveat* having been entered for the purpose of delay, (as stated by the deponent,) probate was not granted to the executrix till the 6th of May, 1852. It further appeared that the plaintiff was not aware till immediately before her death that the award had been taken up by the defendant.

A rule *nisi* having been obtained in Trinity term for entering up judgment *nunc pro tunc*, as of Michaelmas term, 1851,

Quain (June 9) showed cause. The executrix not having come within two terms, is not entitled to have judgment entered up *nunc pro tunc* under the statute of Car. 2. Archb. 1015.

[JERVIS, C. J. This is not a motion to enter up judgment under the statute, but to enter it up as if the plaintiff were alive, and the judgment had not been entered on account of some delay, which the plaintiff could explain.]

Then the application must be under the common law.

[JERVIS, C. J. The plaintiff says you caused delay by entering a *caveat* against the probate.]

But that was a delay in the Ecclesiastical Court, and no other delay can be taken into consideration by this court than the one which has

taken place there. There is no case in which delay in another court has been held sufficient to entitle a party to judgment *nunc pro tunc*. *Archb.* 1016. Besides, the judgment might have been signed in the lifetime of the plaintiff.

[JERVIS, C. J. Is there any case which prevents us from interfering? because, if there be not, justice clearly requires us to do so.]

Evans v. Rees, 12 Ad. & E. 167; s. c. 9 Law J. Rep. (N. s.) Q. B. 317, is in point.

[MAULE, J. In *Evans v. Rees* there was a delay in the taxation, and that was an act of the court and not of the party. Therefore, that case is an authority only to show that the court will not interfere except the delay is caused by the court.]

Phinn, in support of the rule. The question is, whether the court has the power to do substantial justice under the circumstances of the case, and whether for that purpose it will put the executrix in the same position she was in immediately after the death of the testator. In *Evans v. Rees* the delay was not the act of the court. The delay was not caused by the taxation, but by the parties not getting ready for the taxation.

[JERVIS, C. J. In the case of *The Fishmonger's Company v. Robertson*, 3 Com. B. Rep. 970; s. c. 16 Law J. Rep. (N. s.) C. P. 118, Wilde, C. J., in giving judgment, states, that he knows of no case where the court has interfered, except to remedy its own negligence, and goes on to say that the court might interfere in a case of misconduct or breach of faith. Now, if the court can interfere in a case of misconduct or bad faith, it is clear that the power of the court is not confined to the cure of the court's own negligence.]

Here it is sworn that the delay took place by reason of the defendant's having entered a *caveat*, and surely that is misconduct. The court will frame its rules so as to do substantial justice.

[CRESWELL, J. The court proceeds in these cases on the principle that no one shall suffer from its acts.

MAULE, J. Entering a *caveat* can hardly be called misconduct or a breach of faith within the meaning of Lord Truro's judgment. All the cases proceed upon the maxim, *Actus Curie*, &c., and this case is not within it.]

The defendant has wantonly entered a *caveat* to prevent the executrix from obtaining her rights. That is sworn to, and not denied. We must take it that the *caveat* was lodged only to prevent judgment from being entered up. If the court should refuse to interfere, this case will be a precedent to the effect that whenever a plaintiff dies, the defendant need only get a *caveat* and throw the executor over two terms, and then the action must be begun again.

JERVIS, C. J. I am of opinion that the rule must be discharged; but I come to that conclusion unwillingly, being desirous that the court should do substantial justice if it can. But the rule is clear, that the only instance in which the court interferes is where the delay has been caused by the court itself, upon the principle, *Actus Curie*,

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&c. I should have been pleased if I could have seen that we should be justified in extending the rule.

MAULE, J. I am of the same opinion. In all probability justice would have been done by granting this rule; but no court in this realm has the power of doing general justice, unrestrained by particular laws; though cases constantly arise where more substantial justice would be done by intrusting the court with power to decide upon the ground of what is just and right in the particular instance. The end of all law, however, is better attained by administering general laws rather than by giving such arbitrary power to the courts. We do not, therefore, discharge this rule on a technical ground, but on the general and wide ground that we cannot exercise an arbitrary jurisdiction. The only definite ground upon which the court has interfered to allow judgment to be entered *nunc pro tunc*, is, that it will not permit its own acts to be detrimental to suitors. We cannot take the wider ground of granting relief because we might thereby be doing substantial justice in this particular case; for that would be exercising an arbitrary power, which exists nowhere except in the high court of parliament.

CRESSWELL, J. I am of opinion that we have no authority or jurisdiction to grant this application. The court has no power to enter judgment *nunc pro tunc*, except when a party is entitled to it. The delay of the court shall injure no one, and, therefore, when the court delays, for the better deciding of a matter, no person shall be injured thereby. The rule is founded on good sense; but if we depart from this ground of proceeding, I do not know where we could stop. The court would then be not administering the laws, but deciding upon arbitrary grounds.

TALFOURD, J. It seems to me that there is no principle or precedent for making this rule absolute. I join in the regret of the rest of the court that we have no power to do so.

Rule discharged.

Per Curiam.

Costs to be paid by the plaintiff, if the defendant pay the money and costs mentioned in the award.

Winch v. Williams.

WINCH v. WILLIAMS.¹

June 11, 1852.

Writ of Trial — Assessor's Notes insufficient — Affidavit — Practice — Resolution of the Judges, 4 Mo. & Sc. 484.

A rule *nisi* for a nonsuit in a cause tried before the assessor of the Liverpool Passage Court was moved for by counsel and granted. The rule was drawn upon reading the writ of trial and an affidavit verifying the assessor's notes: —

Held, on cause shown against the rule, that without the affidavit the court had no materials on which to entertain the motion.

In the affidavit the deponent described himself as "S., clerk to E. J., Esq., barrister-at-law and assessor of the Court of Passage of the borough of L.": —

Held, insufficient for not stating deponent's place of residence.

THIS action was tried, under a writ of trial, before the assessor of the Passage Court at Liverpool, and the plaintiff had a verdict.

Byles, Serg., (May 22) obtained a rule *nisi*, to enter a verdict for the defendant, or for a nonsuit, and the rule was drawn up on reading the writ of trial and the affidavit verifying a copy of the assessor's notes and the copy. The deponent described himself as "Thomas Henry Sanger, clerk to Edward James, Esq., barrister-at-law and assessor of the Court of Passage of the borough of Liverpool," but did not state the deponent's place of residence.

Burnie now showed cause. The affidavit is defective in not stating the deponent's place of residence. *Daniels v. May*, 5 Dowl. P. C. 83, and *Elton v. Martindale*, 5 Dowl. & L. P. C. 248.

[MAULE, J. Is it absolutely necessary that there should be an affidavit? In the case of a trial in the superior courts the judge does not communicate his notes, but sends a report of the case, when the rule has been granted, on his own responsibility. It may be wholly or in part from his memory.]

In such cases the court takes the statement of what occurred at the trial from the counsel who moves the rule; but in the case of a trial before the sheriff, or other inferior officer, the invariable practice is to require a copy of the notes to be produced and verified on moving for the rule. The rule in this case is not drawn up on hearing counsel and reading the writ of trial, and the court have no materials before it, except the writ of trial and what is contained in the affidavit.

Byles, Serg., and *Unthank*, contra. The affidavit and copy of the assessor's notes were not necessary on moving for the rule. If the rule be drawn up on reading the writ of trial, as in the ordinary case

¹ 21 Law J. Rep. (N. S.) C. P. 216; 16 Jur. 935.

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where the trial has taken place at *Nisi Prius* on reading the record, that is sufficient. The court will adopt the contents of the affidavit as the statement of counsel.

[CRESSWELL, J., referred to the resolution of the judges, 4 Mo. & Sc. 484, requiring the production of an examined copy of the sheriff's notes, and an affidavit verifying the same. In *Lawlor v. Clements*, 8 Dowl. P. C. 688, Coleridge, J., said he had no doubt the rule applied only to writs of trial.]

The court may well enforce that resolution as regards causes tried before the sheriff, over whom, as their officer, they have a general jurisdiction, but they have no authority to enforce it as regards causes tried before other tribunals.

[CRESSWELL, J. The court have a special jurisdiction over the judge to whom they send the writ of trial.

MAULE, J. If the affidavit is insufficient, we have no materials before us.]

The report of the assessor who tried the cause is ready in court. Secondly, the affidavit is sufficient, the only object is to ascertain the identity of the party swearing.

[JERVIS, C. J. The cases show that if a deponent simply describe himself as "clerk to A. B. the defendant's attorney," without stating any residence, that will not do. What distinction can be drawn between those cases and this?]

Per Curiam.

Rule discharged.

MYERS v. PERIGAL.¹

May 4, 6, 1852.

Mortmain — Shares in a Bank — 9 Geo. 2, c. 36.

A bequest of the proceeds of shares in a joint-stock banking company, formed under a deed of settlement, and which possessed freehold and copyhold property, does not come within the Statute of Mortmain, 4 Geo. 2, c. 36.

THE following case was stated by the direction of the Court of Chancery for the opinion of this court.

CASE. Timothy Myers, deceased, by his will, dated the 24th day of June, 1844, duly executed and attested, among other things, directed his executors to convert into money all the residue of his personal estate, the shares in the Durham and Northumberland District Bank, at Newcastle, and to invest the proceeds in government securities, and to pay the dividends arising therefrom, and the dividends arising from

¹ 21 Law J. Rep. (N. S.) C. P. 217; 16 Jur. 1118.

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his said shares in the Durham and Northumberland District Bank, unto his wife, Ann Myers, for her life; and from and after her decease to sell and convert into money his said bank shares, and invest the same in government securities, which, with the government securities thereinbefore directed to be purchased, he directed to ———, in his name, and the proceeds thereof to be from time to time received by the following societies, namely, the Society for Promoting Christian Knowledge, the Society for Propagating the Gospel in Foreign Parts, the Church Missionary Society, and the Church Building Society. The testator died on the 4th of February, 1845, leaving his said wife, now his widow, the plaintiff in this suit, him surviving. The testator was, at the time of making his will and of his death, entitled to five hundred and sixty shares in the Durham and Northumberland District Bank, at Newcastle, in his will mentioned, which is a bank established and carried on in conformity with the provisions of an act of parliament passed in the 7th year of the reign of his late majesty King George the Fourth, entitled "An Act for the better regulating copartnerships of certain bankers in England, and for amending so much of an act of the 39th and 40th years of the reign of his late majesty King George the Third, entitled 'An Act for establishing an agreement with the governor and company of the Bank of England, for advancing the sum of three millions towards the supply of the service of the year 1800,' as relates to the same," and by and under a deed of settlement, dated the 1st day of July, 1836, whereby it is (amongst other things) provided that they, the said several persons, parties thereto, all of whom were distinguished by the title of proprietors, and the several other persons who for the time being should become and be proprietors of shares in the capital of the said company, should constitute and form an association or public joint-stock banking copartnership, to be called, and they should be called "The Northumberland and Durham District Banking Company," to be managed and conducted under and subject to the several rules, regulations, provisions, and agreements thereafter contained, and that they, the said several parties thereto, should and would from time to time, and at all times, so long as they should respectively continue and remain members thereof, promote and advance the interests and prosperity of the same to the utmost of their power respectively; and the said company should have continuance until the same should be dissolved, under or in pursuance of the provisions in that behalf thereafter contained.

That the original capital or joint-stock of the said company for carrying on the same, should consist of the sum of 500,000*l.* sterling, and should be divided into fifty thousand shares of 10*l.* each share, but might be increased, under the power for that purpose thereafter contained, by additional shares, in such manner as thereafter expressed; and the shares which at the date of the said indenture had not been taken or subscribed for, and also those which might thereafter be created, as thereafter provided, should be allotted and distributed, and disposed of to such persons, in such manner, and on such terms and considerations, in every respect as the directors of the

said copartnership bank for the time being, should deem most conducive to the benefit and advantage of the company.

That the business of the company thereby established, should be exclusively confined to such as was reasonably carried on under the term "banking," including the issuing of notes of hand, or bank-notes, lending money on cash or other accounts, or upon real or personal security, bills of exchange, promissory notes, or letters of credit, advancing money on the deposit of title deeds, goods, wares, and merchandise, discounting bills of exchange, notes payable at or after sight, after date, or on demand, borrowing or taking up money on receipts, bills, promissory notes, or other obligations, including also purchases, investments, dealings, or sales in or upon the government or public funds of Great Britain, navy or exchequer bills, India bonds, bank or East India stock, shares of the stock of their own copartnership, or of the stock of the Bank of England, or annuities for one or more life or lives, or of any other description, and also including all other business and transactions usual in banking establishments, and consistent with the laws then or thereafter to be in force, concerning joint-stock banking companies and banking copartnerships; and the business of the company should be conducted so as not to contravene any of the provisions of the said recited act; provided always, that the funds of the said company should not in any instance be invested in the stock, funds, or loans of any foreign country, or in the purchase of lands, or other real estate, except as thereafter mentioned, articles of merchandise, mining concerns, or other adventures.

That no benefit of survivorship should arise or take place amongst the shareholders in the said copartnership bank; and all the property of the company, as between the shareholders thereof, and as between their respective real and personal representatives, should always be considered and deemed to be personal estate, so that each and every of the shareholders should, as between and amongst themselves, have a distinct and separate right to his shares in the capital or joint-stock of the company; and the same should be vested in him to and for all intents and purposes, and, subject to his disposition by deed or will, or in case of intestacy, be transmissible to his personal representatives, as part of his personal estate, and distributed accordingly, but under and subject to such provisions in the deed of settlement as should, for the time being, affect such shares, and also to his proportion of the profits and losses as next thereafter mentioned.

That each shareholder should be entitled to, and interested in, the profits, and be liable and subject to the losses of the company, in proportion to his shares in the capital fund or joint-stock thereof. That previously to the meeting of the company to be held in the month of July, 1837, as thereafter provided, and previously to the meeting to be held in January, in the next and every subsequent year during the continuance of the company, the directors should determine upon such dividend out of the clear profits of the company, as they, the directors, should, within twenty-one days next after every meeting at which any dividend should have been announced by them, or any bonus should have been determined on, cause the same dividend and

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bonus respectively to be divided amongst and paid to the shareholders respectively, according and in proportion to the number of their respective shares, at such time and in such manner as the directors shall think fit.

That it should and might be lawful for the directors for the time being of the said company, and they were thereby authorized and empowered, to provide, in Newcastle-upon-Tyne, and in such other towns and places as they might think fit, such houses, offices, or premises as they should from time to time deem requisite or expedient for carrying on and managing the business affairs and concerns of the company, upon such terms and stipulations, and in such manner as they might deem advisable; and such directors might, for those purposes, with and out of the funds of the company, purchase, in fee simple, or for any other estate, or take a lease of, at a yearly or other rent, or otherwise, any houses, buildings, or premises, or, in like manner, purchase or take a lease of any land, and erect or build any houses thereon, and keep such houses or buildings in repair for the purposes aforesaid, and fit up, adapt, and furnish the same for the use of the company and at the expense thereof, and the same lands, houses, and buildings, or any of them respectively, or any part of them, should or might, from time to time, and at all times afterwards, sell again, exchange, convey, assign, demise, let, or otherwise dispose of, or deal with for the benefit of the company; and that such lands, houses, and buildings so purchased as aforesaid, should, for the purposes of the said deed, be deemed personal estate and part of the capital of the company, and from time to time included in the valuation of capital, and should be vested in trustees for that purpose, appointed on behalf of the company, upon such trusts as would effectually secure the object and intention of the said deed in relation thereto.

That as to such of the funds and capital or property of the company for the time being in the hands of the company as should not be employed, or appear necessary to be employed in the ordinary business thereof, the directors for the time being should, so far as they conveniently could, accumulate the same at interest; and for that purpose might, from time to time, lay out and invest the same, either in the names of the trustees for the time being, of the company, or of such other persons as the same directors might appoint, in or upon some or one of the parliamentary stocks or public funds of Great Britain, or in navy or exchequer bills, &c., as they might think proper; and any board of directors, when they should deem it expedient, might cause any of the funds or property so by this article authorized to be laid out and invested as aforesaid, to be disposed of, called in, or otherwise converted into money; and the money arising thereby to be again laid out and invested in and upon any of the stocks and securities as aforesaid; and so, from time to time, as occasion might require.

That the general board of directors should appoint two or more proper persons to be trustees of the said copartnership bank, in whose names, or in the names of some or one of whom, all grants,

conveyances, and assurances of property in favor or for the use of the same copartnership, and all instruments and assurances for the security or for the indemnity thereof, and of the directors, officers, property, capital, stock, and effects thereof should be made and taken.

That all securities, investments, and purchases which, in pursuance of the said indenture should be taken or made by or in the names of the said present or any future trustees, or any other person or persons in trust for or on account of the company, and all moneys and other estates and effects thereby secured, or therein invested or accruing therefrom, should be under the control and subject to the order and disposition of the board of directors of the said copartnership bank for the time being; and every order or direction made in writing by the said board of directors touching the disposition of, or dealing with the same securities and investments and purchases, respectively, should be obligatory on and observed by the said trustees or trustee, and should be a justification to them and him, and their and his indemnity, in acting in obedience to such order or direction; and all such trustees should, when required by the said board of directors, sign, seal, and execute, and should be bound to sign, seal, and execute, at the expense of the company, such declarations of trust of the estates, securities, moneys, and effects purchased, taken, holden or possessed by or vested in them respectively, on behalf of the company, as such board of directors or their counsel should, from time to time, advise or require.

That if, in pursuance of any of the powers contained in the said indenture, the company thereby established should be dissolved, the said board of directors should, with all convenient speed, wind up, settle, and bring to a final rest and balance the accounts and affairs of the company; and for giving effect to such winding up and settlement, but for no other purpose, the company, and the powers of the directors, and the election of new directors to supply vacancies, should be held to be subsisting and continuing, any thing thereinbefore contained to the contrary notwithstanding; and such of the funds and property of the company as should not then consist of money, and so much of the capital and profits of the company as should remain after answering the claims and demands thereon, should be paid to and distributed amongst the shareholders existing at the time of the dissolution, and their respective executors, &c., in the proportions in which they should then be respectively entitled thereto.

The property of the said bank consists, among other things, of certain freehold and copyhold hereditaments, and money due on mortgage of freehold, or copyhold, or leasehold hereditaments. The plaintiff, testator's widow, and the next of kin, and their representatives, contended that the bequest of the proceeds of the sale of the testator's shares in the said bank to the said several societies in his will mentioned, is restrained and rendered void by the act of 9 Geo. 2, c. 36, for restraining the disposition of lands whereby the same become inalienable. The parties representing the several societies contended that the bequest was a valid one and not restrained by the statute.

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The question for the opinion of the court was, whether the bequest made by the will of the testator, Henry Myers, of his shares in the bank, from and after the decease of his wife Ann Myers, in his will named, was a legal bequest within the statute of the 9 Geo. 2, c. 36.

The preamble of the 9 Geo. 2, c. 36, is as follows:—Whereas gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this public mischief has of late greatly increased by many large and improvident alienations or dispositions by languishing or dying persons, or by other persons to uses called charitable uses, to take place after their deaths to the disherison of their lawful heirs." The first section enacts that no lands, money, or personal estate should be granted to such purposes, except by deed executed in a specified manner. The third section provides that all gifts, grants, &c., of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or of any estate or interest therein to or in trust for any charitable use whatsoever shall be void.

Byles, Serg., (*Lucas* was with him,) May 4 and 6, for the widow and next of kin. The bequest was void under the Mortmain Act. The company, the shares in which form the subject of dispute, was an unincorporated banking company, and similar, with some exceptions, to a common banking company. The testator was a member of the copartnership; and it had both freehold and copyhold land and moneys laid out on mortgage. It had, therefore, an interest in land; and although, perhaps, the legal interest was in trustees, the beneficial interest was in the partners. Although a shareholder might not have any control over the land, his creditor might have. In *Tomlinson v. Tomlinson*, 9 Beav. 459, canal shares, which were declared to be personal estate by statute, were held by Sir John Leach to give an interest in land within the Mortmain Act. In *Howse v. Chapman*, 4 Ves. 542, the bequest of a residue for the improvement of the town of Bath was held void as respected a navigation share. In *Myers v. Perigal*, 16 Sim. 533; s. c. 18 Law J. Rep. (N. S.) Chanc. 185, the Vice-Chancellor held that shares in the banking company were within the statute. It may be said that the company's deed declares that shares are to be personal estate; but in *Baxter v. Brown*, 7 Man. & G. 198, where there was a similar provision, it was held that each partner had an interest in the realty. The shares are only made chattels for the purpose of their transmission, but their nature is not altered by that provision. In *Custance v. Bradshaw*, 4 Hare, 315; s. c. 14 Law J. Rep. (N. S.) Chanc. 358, it was held, that a deceased partner's share in freehold and copyhold property of the partnership was not personal estate for the purpose of probate duty. That was the case of an unincorporated society like this. There is a difference between the case of a corporate and an unincorporated body. In the case of a member of a corporate

body, a creditor has only a right to profits, and has no remedy against the land; but in the case of an unincorporated body, a creditor may seize and sell the share of a partner. Shares in an unincorporated company possessing land, must, therefore, be within the statutes of mortmain. The cases of *Thompson v. Thompson*, 1 Coll. C. C. 381; s. c. 13 Law J. Rep. (N. S.) Chanc. 455, *March v. The Attorney-General*, 5 Beav. 433, *Sparling v. Parker*, 9 Ibid. 450; s. c. 16 Law J. Rep. (N. S.) Chanc. 57; *Hillon v. Giraud*, 1 De Gex & S. 183; s. c. 16 Law J. Rep. (N. S.) Chanc. 285, and *Ashton v. Lord Langdale*, 20 Law J. Rep. (N. S.) Chanc. 234; s. c. 4 Eng. Rep. 80, may be relied upon on the other side. The last of those cases is under appeal, and all the others, except *Sparling v. Parker*, are distinguishable from the present. The authorities, therefore, conflicting with each other, the words of the statute must be referred to; and they plainly show the intention of the legislature to bring such a bequest as the present within the operation of the statute.

Cowling, contra. The statute was intended to apply to lands, tenements, and hereditaments — to real property and not to personalty. Then, the question is, whether a share in such a company as this bank, is in the nature of personal property, or of lands and tenements. If it be mixed up of both it cannot be held to come within the statute. These shares are, in fact, personalty. The shareholder subscribes to a common fund, and his right depends upon the contract he makes by depositing his money. The interest of the shareholder is founded upon this contract, and will, therefore, pass as personalty. By the deed, the legal estate is in the trustees, and there is no legal estate in the shareholders. The management is vested in the directors, and the business is done without any control of the individual shareholders, except what they exercise at the general meeting. They have an interest only in the funds of the company. While the company exists, no individual shareholder has an interest in the land. If judgment were recovered against a shareholder, no part of the land could be taken in execution, though the share might be taken and disposed of. In *March v. The Attorney-General*, it was held, that policies of assurance payable out of the funds of a company whose assets were partly real estate, were not within the Mortmain Act. A joint-stock company, too, is totally different from an ordinary copartnership. In the latter, any one copartner may be agent to bind the rest; but that cannot be the case with regard to a joint-stock company. In the case of *Baxter v. Brown*, which has been referred to, there was real property vested in trust for each individual shareholder. But in a joint-stock company, no individual has any right to a control over the land. No reliance need be placed on the fact that shares in the company are declared in the deed to be personal property. The case of *Bligh v. Brent*, 2 You. & C. 268; s. c. 6 Law J. Rep. (N. S.) Exch. Eq. 58, which is recognized in *Humble v. Mitchell*, 11 Ad. & E. 205; s. c. 9 Law J. Rep. (N. S.) Q. B. 29, established that real property held for the purposes of a trading corporation is, in equity, deemed personal estate; and, from the observations of the

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judges there, it would appear that no distinction can be drawn in this respect between a corporation and an unincorporated company. In the case of *The Attorney-General v. Giles*, 5 Law J. Rep. (N. S.) Chanc. 44, East India stock was held not to be within the Mortmain Acts. Lord Cottenham's whole judgment in that case is applicable to the present. *Curling v. Flight*, 2 Ph. 613; s. c. 17 Law J. Rep. (N. S.) Chanc. 359, and *Howse v. Chapman*, are further authorities to show that the shares in the bank in question were personal property.

Our. adv. vult.

Afterwards, this court returned the following certificate to the Court of Chancery :

"The case has been argued before us by counsel. We have considered it, and are of opinion that the said bequest made by the said will of the said testator Timothy Myers, of his, the said testator's shares in the Durham and Northumberland District Bank, from and after the decease of his wife, Anne Myers, in his will named, is a legal bequest within the statute of the 9 Geo. 2., intituled 'An act to restrain the disposition of lands whereby the same become inalienable.'

"JOHN JERVIS.

"C. CRESSWELL.

"E. V. WILLIAMS.

"T. N. TALFOURD."

DOE d. ROBERTON v. GARDENER.¹

June 21, 1852.

Lease, Construction of — Rent-charge — Livery of Seisin, Presumption of.

M. H. and W. R., by indenture of February, 1805, granted and leased certain premises unto and to the use of J. H., his heirs, executors, administrators, and assigns forever, yielding and paying therefor a yearly rent. Proviso for re-entry on non-payment of rent. Covenant by J. H. for payment of the rent, for repairs, and for insurance : —

Held, that, in the absence of proof that the premises were, at the date of the instrument, in the occupation of tenants, and the expressed intention of the parties precluding the presumption of livery of seisin, the instrument could not operate as a conveyance of the fee subject to a rent-charge, but only to create a tenancy from year to year.

Semle, that if it had been necessary to presume livery of seisin in order to account for the possession under the instrument, the court would have made that presumption.

THIS was an action of ejectment, for the recovery of an undivided moiety of certain lands and premises situate in the parish of Manchester, in the county of Lancaster. On the trial, before Cresswell, J., at the spring assizes at Liverpool, in 1852, a verdict was found for

¹ 21 Law J. Rep. (N. S.) C. P. 222.

the plaintiff, with nominal damages, subject to the opinion of the court on the following

CASE. The lands of which the undivided moiety was sought to be recovered, formerly belonged to a Mrs. Catherine Heath, widow, who, by her will of the 21st of May, 1772, devised them to her daughter, Mary Heath, and her other daughter, Hannah Robertson, wife of William Robertson, Esq., and their heirs, forever, as tenants in common. In 1780 Mrs. Heath died. On the 23d of August, 1781, an indenture was executed between the said William Robertson and Hannah his wife of the one part, and one Daniel Whittaker of the other part, whereby the said William Robertson and Hannah his wife covenanted that they would, at the then next or some other subsequent assize to be holden for the County Palatine of Lancaster, acknowledge and levy, &c., one or more fine or fines — *sur consuance de droit come ceo*, &c.—with proclamation unto the said Daniel Whittaker and his heirs, of the undivided moiety or equal half part of, amongst others, the lands devised by Mrs. Heath above mentioned; and it was thereby declared that such fine or fines should enure to and for the use and behoof of such person or persons, and for such estate and estates, intents and purposes as the said William Robertson and Hannah his wife, or as the said Hannah alone, without the said William Robertson her husband, notwithstanding her coverture, should, in such manner as was therein contained, limit or appoint. And, in default of such limitation or appointment, to the use and behoof of the said William Robertson and Hannah his wife, for their joint lives and the life of the survivor of them; and from and after the decease of the survivor of them, to the use and behoof of the right heirs of the said Hannah Robertson forever.

A fine was shortly afterwards, in the same year, levied accordingly. In February, 1801, Hannah Robertson died without having executed any of the powers of the above-mentioned deed, leaving her husband surviving. On the 2d of April, 1802, her son and heir, Archibald Hamilton Robertson, died. He left two daughters surviving, Mary, the lessor of the plaintiff, born on the 20th of September, 1798, and Emily, born on the 25th of April, 1801. On the 1st of May, 1801, by indenture between Mary Heath, above mentioned, and the said William Robertson of the one part, and James Rothwell of the other part, the said Mary Heath and William Robertson demised to the said James Rothwell a warehouse with the appurtenances, part of the said premises so devised by Catherine Heath, and then in the possession of the said James Rothwell, for the term of eleven years from the 24th of June then next.

On the 8th of February, 1805, by indenture between Mary Heath above mentioned and the said William Robertson of the one part, and James Heath of the other part, reciting that the said Mary Heath and William Robertson, by virtue of the last will and testament of Catherine Heath, widow, deceased, late mother of the said Mary Heath and of Hannah Robertson, late wife of the said William Robertson, were entitled as tenants in common, amongst other things, to the here-

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ditaments and premises hereinafter mentioned, and that the said Mary Heath and William Robertson had agreed to grant a perpetual lease thereof to the said James Heath, his heirs, executors, administrators, and assigns, in manner thereafter mentioned, it was witnessed, that, in pursuance of the said agreement, and for, and in consideration of the clear yearly rent, covenants, and agreements, thereafter mentioned and reserved, and on the part and behalf of the said James Heath, his heirs, executors, administrators, and assigns, to be paid and performed, they, the said Mary Heath and William Robertson, according to their several and respective estates, rights, and interests, in the hereditaments and premises thereafter mentioned, granted, demised, leased, set, and to farm, let unto the said James Heath, his heirs, executors, administrators, and assigns forever, the said lands devised by the said Catherine Heath, described to be in the respective tenures or occupation of William Nabb, James Rothwell, Hardwick Taylor, Hughes Giles Chatterton, Robert Jackson and others, to hold from the 25th of December then last past, unto and to the use of the said James Heath, his heirs, executors, administrators, and assigns, forever; yielding and paying therefore yearly, and every year, unto the said Mary Heath and William Robertson, their heirs, executors, administrators, and assigns, forever, as tenants in common as aforesaid, the clear yearly rent or sum of 120*l.* half yearly, on every 24th of June, and 25th of December, with a proviso for re-entry on non-payment of the said rent for twenty-one days, and no sufficient distress on the premises. Covenant by the said James Heath with the said Mary Heath and William Robertson, their heirs, &c., for payment of the said rent, also of all chief or quit rents, also to maintain and keep the premises in good order and sufficient tenantable repair at all times during the continuance and validity of the lease, also to keep the premises insured, &c.

A memorandum was indorsed on this deed, signed by the said Mary Heath and William Robertson, consenting and agreeing that the said James Heath, his heirs, executors, administrators, or assigns, might, at their will and pleasure, assign the said lease and premises to any person or persons whomsoever.

On the 25th of February, 1812, the said William Robertson died. In December, 1813, the said Mary Heath died, devising her property to the lessor of the plaintiff, Mary, and her sister, Emily. In 1836, Emily died unmarried. In 1825, James Heath, the lessee, died, and was succeeded by his son and heir at law, Ashton Marler Heath, who afterwards, on the 9th of May, 1840, deposited the said deed of the 8th of February, 1805, and his other deeds and writings, relating to the said premises, with the defendants, by way of equitable mortgage for moneys advanced by them to him exceeding the value of the said premises, without any notice to them, at the time of such advances and deposit, of the title of the lessor of the plaintiff. The said Ashton Marler Heath, afterwards becoming bankrupt, he, together with his assignees, on the 2d of December, 1848, conveyed the lands to the defendants in fee for value, in part satisfaction of the said advances then remaining unpaid. They had notice of the title of the lessor

of the plaintiff before they took such conveyance. The lessor of the plaintiff afterwards gave notice to quit as to the moiety in question. The mother of the lessor of the plaintiff, who had been examined on interrogatories, stated in her examination that her daughters, Mary, the lessor, and Emily, received 120*l.* a year from the property (the undivided half of which was sought to be recovered), from the time of their respectively coming of age up to the death of the said Emily, and that since her death the same sum had been received by or on behalf of the said Mary up to Christmas, 1850. That she, the mother, first received the rent herself of one undivided moiety of the property, amounting to 60*l.*, in the year 1812, on behalf of her said two daughters, who were then minors, and continued to receive it during their minorities. That the first half-year's rent became due at midsummer, 1812, and that she, the mother, received it in right of her daughters as co-heiresses of their father, the said Archibald Hamilton Robertson, and on the death of the said Mary Heath, which happened in December, 1813, she, the mother, received the rent of the other moiety of the property, amounting to 60*l.*, for her said daughters, as devisees of the said Mary Heath, during their minorities, the first payment of such rent of that moiety being due at Christmas, 1813. That the rents of both moieties were paid by Mr. James Heath, up to the time of his death, and since his death, which happened about the year 1825, they were paid by his son, Ashton Marler Heath, up to Christmas, 1847. That the rents accrued since that time had been paid by the defendants up to Christmas, 1850. That the rents became due half-yearly, at Christmas and midsummer, and that the amount for both moieties had been 120*l.* a year.

The case then recited a long correspondence between the lessor of the plaintiff and Ashton Marler Heath, and receipts signed by the lessor for the rent of the premises comprised in the deed of February, 1805. The judgment of the court renders it unnecessary to set them out.

The defendants' counsel contended that the lessor was barred by the Statute of Limitations. It is agreed that the court are to draw any inferences which a jury ought to do. The question for the court is, whether the lessor is barred by the Statute of Limitations. If not, the verdict is to stand. If she is so barred, a nonsuit is to be entered.

Cowling (*Knowles* with him), for the lessor of the plaintiff. The lessor of the plaintiff is entitled to recover in this ejectment, as she is not barred by the Statute of Limitations. At the date of the deed of 1805, Mary Heath was tenant in common in fee of one moiety of the land, and William Robertson tenant in common for life of the other. That deed operated as a separate demise of their respective interests; for where tenants in common join in a lease, "the joint words of the parties shall be taken respectively and severally." *Co. Litt.* 197, a., *Bac. Abr.* tit. "Joint Tenants," k. On William Robertson's death, in 1812, the fee in his moiety, the one in dispute, vested in the lessor and her sister Emily, in possession; and the rent has

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ever since been regularly paid; and there has been a sufficient receipt, within the third section, to save the statute. The twenty years mentioned in section 2, did not begin to run until the expiration of the notice to quit. Then section 3 saves the right of the claimant, who has been in the possession or in receipt of the profits of such land; and section 35 enacts, that rent "from a tenant from year to year, or other lessee, shall be deemed to be the receipt of the profits of the land within section 3." The lease in this case was void as to the moiety of the lands in question, on the death of W. Robertson, the tenant for life; but as the rent reserved by that lease has ever since been paid, a tenancy from year to year has been created. *Doe d. Martin v. Watts*, 7 Term Rep. 83; *Doe d. Brammall v. Collinge*, 18 Law J. Rep. (N. S.) C. P. 305. But it is only necessary to contend as against the landlord, and, therefore, also, as in his favor, that some tenancy was created; the defendants have held the land, not in their own right, as absolute owners; and, if they are not tenants, they are bailiffs; and their possession has been that of the owners. If the lessor of the plaintiff is barred of the land, she is barred also of every interest in it, for the mere receipt of rent creates no rent-charge.

Tomlinson (Thompson with him), for the defendants. The lessor of the plaintiff is barred by the statute. The 2d and 3d sections have done away with the distinction between adverse or non-adverse possession; and the defendants have been in possession more than twenty years. The hardship urged by the lessor of the plaintiff does not exist, for if she is barred of the land, she has a good title to the rent as a distinct inheritance, the effect of the deed of 1805, being, first to pass the fee simple in the land, and secondly to create a distinct estate in the rent-charge in perpetuity. The deed professes to "grant" the land to James Heath, his "heirs, executors, administrators and assigns forever." First, to support the deed, the court will, after so long an interval, presume livery of seisin to make it operate as a feoffment. *Rees v. Lloyd*, Wightw. 123. That case was recognized in *Doe d. Wilkins v. The Marquis of Cleveland*, 9 B. & C. 864; s. c. 8 Law J. Rep. K. B. 74, and in *Doe d. Lewis v. Davies*, 2 Mee. & W. 503; s. c. 6 Law J. Rep. (N. S.) Exch. 176; or, secondly, as the court are at liberty to draw inferences of fact as a jury, they will presume that the land was full of tenants at the date of the deed, and so make it operate as a grant of the reversion, and thus *quâcunque viâ*, the fee passed. The deed itself describes the property as in the hands of certain tenants, and in strong confirmation of this, the case states that a lease had been previously granted to one of them, namely, J. Rothwell. It may be urged that the covenant against alienation is inconsistent with this view. But a condition not to alien in a deed which passes the fee is void. Co. Litt. s. 360, and Coke's commentary on it.

[MAULE, J. That may be; but the argument will be, that the existence of such a covenant is inconsistent with the presumption that they intended to pass the fee. They seem to have been disposed as between themselves to repeal the statute of *Quia Emptores*, and to create a reversion after an estate in fee.]

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It is submitted that the deed operated as a feoffment, and also as a grant of a rent-charge, and that there was no reversion, and no relation of landlord and tenant created. In Littleton, sec. 215, it is said — "If a man will make a feoffment in fee, or will give lands in tail, the remainder over in fee simple, without deed, reserving to him a certain rent, this reservation is void, for that no reversion remains in the donor." But "if a man by deed indented make a feoffment in fee, and by the same indenture he reserveth to him and to his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs to distrain, &c., such a rent is a rent-charge." Heath, the lessee, executed this deed, and thereby granted the rent-charge, and each party has treated their respective rights as springing from the deed, and from it only. As to the point made with reference to the receipt of the profits of the land, the defendants do not deny that the lessor of the plaintiff has been in receipt of the rent as a distinct inheritance, which is what "rent" in section 3 means; but they deny that she has been in the receipt of "rent" as profits of the land within sections 3 or 35. *Doe d. Angell v. Angell*, 9 Q. B. Rep. 28; s. c. 15 Law J. Rep. (N. S.) Q. B. 193.

Cowling, in reply. The argument of the defendants raises two questions: first, what is the effect of the deed? and, secondly, what has been the conduct of the parties since? To consider the second question, first: the parties have supposed (and if erroneously it makes no difference as to the effect of their acts) that the deed operated as a lease, and under that supposition they have, as tenants, paid rent for the enjoyment of the land. If so, the construction of the deed becomes immaterial, as there has been such a receipt of profits within sect. 31, as saves the lessor from being barred. But, secondly, the deed does not create a rent-charge. It purports to be an ordinary lease; the *habendum* is in the usual form, except the words "heirs" and "forever." The *redendum* is "yielding and paying therefor," i. e. for the enjoyment of the land, and it contains all the usual covenants for repairs, payment of taxes, for quiet enjoyment and against alienation. The only words which can be construed as creating a rent-charge, for there is no absolute grant of one, are contained in the covenant to pay rent. But the reservation of the rent is by the lessor; there is no grant by the lessee. The form of deed to create a rent-charge given in 9 Jarman's Bythewood, 518, is nothing like this; and the reservation of rent spoken of in Litt. s. 217, cannot mean "rent" as a compensation for the enjoyment of the land.

[MAULE, J. Blackstone, in his "Commentaries," vol. 2, p. 42, says, "a fee-farm rent is a rent issuing out of an estate in fee, of at least one fourth of the value of the lands, at the time of its reservation; for a grant of lands reserving so considerable a rent is indeed only letting lands to farm in fee simple, instead of the usual method for life or years." So Blackstone in effect says, that if lands are let in fee reserving rent, that creates a rent-charge.]

The reservation in that case must not be, as here, for the enjoyment of the land. Supposing the deed created a rent-charge, W. Ro-

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berton could only be entitled to it during his life ; it died with him. And even if the parties have, under the impression that it still existed, gone on paying the money as a rent-charge, that would only create a yearly tenancy, and could not give the lessor any title to the rent as a rent-charge, for that cannot be created by estoppel, but only by express reservation. The lessor is not bound by any thing W. Robertson did, as nothing descended to her from him ("a stranger shall neither take advantage of nor be bound by the estoppel." Co. Litt. 352, a), and the recitals in the deed cannot be binding on her, as she claims, not under, but against it. If the deed did not create a rent-charge, then the cases as to presuming a feoffment are inapplicable.

[Counsel also argued whether the correspondence contained a sufficient acknowledgment of the lessor's title within sect. 14 of the 3 & 4 Will. 4, c. 27, to save it from being barred. But as the court decided that the meaning of the correspondence would depend upon the construction to be put upon the deed of February, 1805, the arguments on this point are omitted.]

Cur. adv. vult.

The judgment of the court¹ was now delivered by

JERVIS, C. J. It will not be necessary to decide some of the questions which were raised upon the argument of this case ; because we are of opinion that, under the circumstances, we ought not to make the presumptions which are necessary to raise those questions. In the course of the argument Mr. Cowling described the instrument of the 8th of February, 1805, as a perpetual lease ; whereas Mr. Tomlinson contended that it operated as a conveyance in fee of the land, with the creation of a rent-charge. If it had been proved that the premises were in the occupation of tenants when the instrument was executed, or if we were to presume livery of seisin, it would operate as a conveyance in fee ; but, as there is no evidence that the premises were in the occupation of tenants (the description of the premises not being evidence against the lessor of the plaintiff, who was not party or privy to the instrument), if we do not presume livery of seisin, then, as the instrument cannot operate as a perpetual lease, the premises must have been held upon a tenancy from year to year, upon the terms contained in that instrument. An examination of the instrument shows that the parties intended it to operate as a perpetual lease ; but as it cannot legally have that operation, we must either presume that the premises have been held upon a yearly tenancy, upon the terms contained in the instrument, or we must presume livery of seisin, an act inconsistent with the expressed intention of the parties, so as to convert the instrument into a conveyance in fee. Were it necessary to presume livery of seisin in order to account for the possession under the instrument, the authorities show that we ought to make that presumption. But it is not necessary to do so. The case shows that rent has been paid regularly to the lessors and

¹ JERVIS, C. J., MAULE, J., and CRESSWELL, J.

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their successors, and it is more consistent with the acts of the parties to presume that the relation of landlord and tenant subsisted between them, than to presume livery of seisin, which was inconsistent with their intention when the instrument was executed. In this view of the case the lessor of the plaintiff has been continuously in the receipt of the rent and profits of the estate, and the Statute of Limitations is no bar. Our judgment must be for the lessor of the plaintiff.

Judgment for the lessor of the plaintiff.

RANDALL v. MOON.¹

April 24, 1852.

Bill of Exchange — Action by Indorsee against Acceptor — Payment by Drawer in another Action.

In an action by an indorsee against the accommodation acceptor of a bill, it is not a good defence to the further maintenance that, after action brought, the drawer paid the amount of the bill, and interest to the indorsee, under a judge's order in another action brought by the indorsee against the drawer.

ASSUMPSIT on a bill of exchange for 49*l.* 18*s.*, drawn by W. A. Turner, accepted by the defendant, indorsed by Turner to T. Edgely, and by him indorsed to M. Worms, who indorsed to the plaintiff.

Plea to the further maintenance of the action, that after the bill became and was due and payable, and whilst the plaintiff was the holder of it, to wit, by reason of the said indorsement thereof to him in the declaration mentioned, and after the issuing of the writ of summons in the cause, the said W. A. Turner, in the declaration mentioned, to wit, at the request of, and for and on behalf of the defendant, paid to the plaintiff, who then accepted and received, of and from the said W. A. Turner, a large sum of money, to wit, a sum amounting in the whole to all the moneys in the declaration mentioned, in satisfaction and discharge of all the causes of action in the declaration mentioned, and the said W. A. Turner thereupon became entitled to have the said bill delivered up to him by the plaintiff; and the defendant further saith, that the plaintiff is not suing in this action as trustee of, or for the benefit of, the said W. A. Turner. Verification, and prayer of judgment.

Replication — That Turner did not, for or on behalf of the defendant, pay to the plaintiff, nor did the plaintiff receive, the money in satisfaction of the causes of action.

The cause was tried at the sittings in Easter term, before Maule, J.

¹ 21 Law J. Rep. (N. S.) C. P. 226.

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It appeared at the trial that the defendant accepted the bill, for the accommodation of the drawer (Turner), but that fact was not known to the plaintiff. The bill became due on the 4th of March, and on the 6th two actions were simultaneously commenced by the plaintiff against Turner and the defendant. On the 13th, a summons was taken out to stay proceedings in the action against Turner, on payment of debt (principal and interest) and costs, and an order (although resisted by the plaintiff) was made accordingly. The declaration in this action was delivered on the 22d of March, and the plaintiff claimed by his particulars the full amount of principal and interest due upon the bill before it was paid by Turner. A verdict was found for the plaintiff, with 50*l.* damages, leave being reserved to the defendant to move to enter a verdict for him, or to reduce the damages.

Macnamara, April 24, moved for a rule *nisi*, pursuant to the leave reserved. This case is distinguishable from that of *Jones v. Broadhurst*, 9 Com. B. Rep. 173, where it was held that satisfaction of a bill as between a drawer or indorser and an indorsee, whether before or after the bill became due, does not necessarily enure as satisfaction on behalf of the acceptor, or operate so as to discharge him from liability to the indorsee. The plea here is so drawn as to avoid the objections which were made the form of the plea in that case, and the defendant here is an accommodation acceptor. There was, therefore, a legal priority between the party who made the payment, and the defendant, the absence of which circumstance was commented upon by the court in *Jones v. Broadhurst*. The payment by the principal would discharge the surety; and though, in general, upon payment by the drawer, the holder becomes trustee for him, and is liable to refund to him what may be recovered from the acceptor, yet in the case of an accommodation acceptance, the drawer is not entitled to sue the acceptor, and no trust arises in the holder on behalf of the drawer. The causes of action included debt and damages, and they, having been once paid, the issue should have been found for the defendant, as it was proved in terms. Costs are not a cause of action, but are only incidental thereto. The action was continued simply for nominal damages, but no action can be carried on for nominal damages or costs only. *Beaumont v. Greathead*, 2 Ibid. 494; s. c. 15 Law J. Rep. (N. S.) C. P. 130; *Thame v. Boast*, 12 Q. B. Rep. 808; s. c. 17 Law J. Rep. (N. S.) Q. B. 339.

[JERVIS, C. J. The word "proceed" is used with regard to both those cases; but in the one case the action was commenced after payment, and in the other it was only continued after payment.

CRESWELL, J. It would be a startling proposition to announce that an action cannot be brought for nominal damages. Surely an action might be brought against a banker for dishonoring a customer's check.]

In the case of *Corbett v. Swinburn*, 8 Ad. & E. 673; s. c. 7 Law J. Rep. (N. S.) Q. B. 215, a plea as to 50*l.* to the further maintenance, which stated the delivery of a bill in satisfaction of the promise and

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of damages (but not of costs), after action brought, was held good. The principal and interest in the present case having been satisfied, there was no cause of action to go on with. Substantially, the plea here is a plea of payment by the drawer.

[JERVIS, C. J. I was at first somewhat embarrassed by the case of *Thame v. Boast*, but on looking into it, I find it appears there that the costs had been paid.]

In *Joule v. Taylor*, 7 Exch, 31; s. c. 7 Eng. Rep. 574, it was held, that nominal damages will not take a debt out of the jurisdiction of the county court.

JERVIS, C. J. I am of opinion that there should be no rule. It seems to me that the payment under the judge's order, in an action at the suit of the holder against the drawer, cannot be said to be a payment in satisfaction of the causes of action against the acceptor.

CRESSWELL, J., and TALFOURD, J., concurred.

Rule refused.

FISHER and another v. BELL and another.¹

June 22, 1852.

Bankrupt Consolidation Act, 1849 — Deed of Composition by Six Sevenths — Separate Property — 12 & 13 Vict. c. 106, ss. 224, 228.

To *assumpsit* on bills of exchange, the defendants pleaded that being joint traders, by deed under the 12 & 13 Vict. c. 106, s. 224, they assigned their joint property to M., who undertook to pay their joint creditors 7s. 6d. in the pound; that six sevenths of the creditors accepted and executed the deed, and the defendants were thereby released from the plaintiffs' claim. The plaintiffs replied, after setting out the deed on oyer, that each of the defendants had separate property. The replication was held good, on the authority of *Taley v. Taylor*, 21 Law J. Rep. (N. S.) Q. B. 346, in error; s. c. 12 Eng. Rep. 469.

ASSUMPSIT by the plaintiffs, as drawers of several bills of exchange, against the defendants, as acceptors, and on two *indebitatus* counts.

Sixth plea, that at the time of the making of the indenture herein-after mentioned, and for six months before suspension of payment, the defendants were traders in copartnership, and jointly indebted to the several persons, parties to the said indenture of the third part. That, after the passing of the Bankrupt Law Consolidation Act, 1849, the defendants suspended payment, and made an indenture, between the defendants of the first part, one G. Marshall of the second part, and the several parties, whose names were subscribed, of the third part, being joint creditors or their agents, reciting, that

¹ 21 Law J. Rep. (N. S.) C. P. 228.

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Marshall agreed to secure, and the said creditors agreed to accept, 7s. 6d. in the pound upon the amount of their respective debts; and the defendants assigned all their joint copartnership property to Marshall, to hold for his own use; and Marshall covenanted to pay the said creditors 7s. 6d. in the pound, by certain instalments; and that the said creditors, in consideration thereof, released the defendants. That the said indenture was signed by six sevenths of the creditors, whose debts amounted to the sum of 10l. and upwards; that the said indenture was a deed of arrangement between the defendants and their creditors within the meaning of the provisions of the Bankrupt Law Consolidation Act, 1849, as to arrangement by deed; that the plaintiffs had notice to subscribe and seal the indenture; and that, by force of the statute, the said indenture became obligatory on the plaintiffs, whereby the defendants were released from the causes of action. Verification.

Replication, (craving oyer of the deed, and setting it out) — That at the time of making and executing the indenture, each of the defendants was possessed and entitled to divers goods, chattels, and effects, his own separate property, to a large amount, to wit, each to the amount of 1,000l., and liable to seizure under legal process, for payment of the debts due to the joint creditors of the defendants. Verification.

Demurrer and joinder.

Channell, Serg., in support of the demurrer, April 29. The deed comes within the provisions of the 224th section of the 12 & 13 Vict. c. 106, "The Bankrupt Law Consolidation Act, 1849," and operates as a release against the creditors who did not execute it. The cases in which the operation of the section have been brought before the court are, *Phillips v. Surridge*, 19 Law J. Rep. (N. S.) C. P. 337; *Stewart v. Collins*, 10 C. B. 634; c. s. 2 Eng. Rep. 332; *Drew v. Collins*, 6 Exch. Rep. 670; s. c. 20 Law J. Rep. (N. S.) Exch. 369, and *Tetley v. Taylor*. In *Tetley v. Taylor*, the Court of Queen's Bench differed from the exchequer in *Drew v. Collins*, and held that the provision in the 228th section that "joint and separate assets shall be distributed in like manner as in bankruptcy," does not apply to the case of a composition deed, and does not invalidate such a deed on the ground that it does not provide for the distribution of the whole of the trader's property.

Barstow, contra, for the plaintiff, relied upon *Drew v. Collins*, which expressly decided that a deed under the 224th section is not binding on a creditor who did not execute it, unless it provide for the distribution of the whole of the trader's estate.

Cur. adv. vult.

JERVIS, C. J. now said, that it was unnecessary to deliver any judgment in this case, as it was governed by the decision of the exche-

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quet chamber in *Tetley v. Taylor*, in error, (which overruled the decision of the court below, and affirmed the decision in *Drew v. Collins*.)

Per Curiam —

Judgment for the plaintiff.

LEROUX v. BROWN.¹

November 10, 1852.

Frauds, Statute of — Parol Contract made abroad — Comity of Nations.

The 4th section of the Statute of Frauds does not make the agreements therein mentioned void, but only prevents their being enforced by action, if the requirements of that section are not complied with.

Therefore, an action cannot be maintained in this country upon a parol agreement, which is not to be performed within a year, although made in France, and valid and enforceable there.

ASSUMPSIT. The declaration stated, that, to wit, on the 1st of December, 1849, at Calais, in France, to wit, at Westminster, in the county of Middlesex, in consideration that the plaintiff, at the request of the defendant, then agreed with the defendant to enter into the service of the defendant as clerk and agent, and to serve the defendant in that capacity for one year certain, at certain wages, to wit, 100*l.* a year, to be paid by the defendant to the plaintiff by equal quarterly payments during his continuance in such service, the defendant then promised the plaintiff to receive him into his service, and to retain and employ him in his said service at the wages aforesaid. The plaintiff then averred that he was ready and willing to enter into the defendant's service, and that he afterwards, to wit, on &c., requested the defendant to receive him into his, the defendant's service. Breach, that the defendant did not, nor would, at the time he was so requested, or at any other time, receive the plaintiff into his service as aforesaid, or retain or employ him at such wages as aforesaid, or in any other way. The only material plea was, *non assumpsit*.

The cause was tried, at the sittings for Middlesex, on the 3d of June, before Talfourd, J., when the jury found that a parol contract had been entered into at Calais, in France, by which the defendant, who resided in England, agreed with the plaintiff, a British subject residing at Calais, to employ the plaintiff as the defendant's agent to collect eggs and poultry at Calais, and to send them over to the de-

¹ 22 Law J. Rep. (N. S.) C. P. 1; 16 Jur. 1021.

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fendant in England, the service to be for one year from a future day at 100*l.* a year. The plaintiff also proved that, by the law of France, this contract, though not in writing, was valid and could be enforced by the courts in that country. The defendant objected that, nevertheless, it was within the 4th section of the Statute of Frauds, which precluded the plaintiff from bringing an action upon it in England.

The verdict was entered for the plaintiff on the issue raised by the plea of *non assumpsit*, and leave was reserved to the defendant to move to enter a nonsuit, or a verdict for himself on that issue.

Hawkins (June 5) obtained a rule *nisi* accordingly, against which

Allen, *Serg.*, and *Metcalf* now showed cause. A foreign contract, valid according to the law of the country in which it is made, may be enforced in this country, notwithstanding that the formalities required by our law to render such a contract valid if entered into here, have not been complied with. The cause of action is to be judged of with reference to the law of the country where it originated, and the mode of procedure must be adopted as it happens to exist in the country where the action is brought. *Huber v. Steiner*, 2 Bing. N. C. 202.

[JERVIS, C. J. The 4th section does not say, as the 17th does, that "no contract shall be good," but that "no action shall be brought upon any contract." There is a clear distinction between contracts absolutely void and those which cannot be enforced. Unless the 4th section bars the right as well as the remedy, this action must fail.]

It has been decided, in *Carrington v. Roots*, 2 Mee. & W. 248; s. c. 6 Law J. Rep. (N. S.) Exch. 95, that although the language of the 4th and 17th sections is different, yet that in effect they are the same, and that the 4th section as well as the 17th renders the contract void altogether. Lord Abinger says, "I think, therefore, that the meaning of the statute is, not that the contract shall stand for all purposes except that of being enforced by action, but it means that the contract shall be altogether void." That construction has been subsequently affirmed by the same court in *Reade v. Lamb*, 6 Exch. Rep. 130; s. c. 3 Eng. Rep. 570. The 4th section, therefore, as it affects the rights and merits of the contract, and not merely the remedy upon it, cannot govern a foreign contract.

[JERVIS, C. J. In *Carrington v. Roots*, the plaintiff brought trespass for seizing his horse and cart. Plea, removal of it damage feasant. Replication, that defendant had sold a crop of grass to the plaintiff, with liberty to take it. Wherefore, &c. Traverse of the agreement. This agreement it turned out was not in writing, and therefore, treated as a sale of an interest in land, it was within the 4th section. The court said that the plaintiff by his replication meant to set up a contract capable of being enforced by action, and that by his action of trespass, he was in fact endeavoring to charge the defendant by means of that contract, but that inasmuch as the 4th section prevented its being enforced by action, it was, for the purpose in hand, in effect void. So in *Reade v. Lamb*, the court say that

"for the purposes of the present question" there is no distinction between the 4th and 17th sections. No doubt a contract which cannot be enforced is practically void.]

It is submitted that in neither case will the language of the judges bear that limited interpretation.

[MAULE, J. If a contract is not to be performed within a year, so much uncertainty is thrown about it, that the legislature has said if entered into in this country it shall not be enforced by action unless it, or some memorandum or note thereof, shall be in writing. That reason would apply with still greater force to such a contract entered into abroad.]

If the contract was valid in its inception, then the defendant ought to have pleaded the 4th section of the Statute of Frauds specially. They also cited Story's Conflict of Laws, s. 260; 1 Burge's Commentaries, 29; 3 Ibid. 760.

Hawkins and *Honyman*, in support of the rule. It is clear that the mode of suing on a foreign contract must be governed by the law of the country where the action is brought. Thus, in *The British Linen Company v. Drummond*, 10 B. & C. 903; s. c. 9 Law J. Rep. K. B. 213, it was held that the English Statute of Limitations was a good plea to an action on a Scotch contract, which might in Scotland have been put in suit at any time within forty years. *De la Vega v. Vianna*, 1 B. & Ad. 284; s. c. 8 Law J. Rep. K. B. 388, and *Huber v. Steiner* are other instances of the application of this rule. Then the question is, whether the 4th section of the Statute of Frauds makes the contract void altogether, or applies only to the mode of enforcing it. A parol contract such as this was good at common law before the Statute of Frauds; the 4th section of that statute does not say it shall be void, but that no action shall be brought, unless it or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith; so that in effect that section brings it to a question of evidence. The agreement itself need not be in writing, but only the evidence of it; therefore if A writes a letter to C, an uninterested person, and signs it, saying that he has entered into a parol contract to a certain effect with B, that letter would satisfy the 4th section. In Sugden on the Law of Vendors and Purchasers, (chap. 3, sec. 3, 11th ed. p. 122,) it is said "a note or letter, written by the vendor to any third person, containing directions to carry the agreement into execution, will, subject to the before-mentioned rules, be a sufficient agreement to take the case out of the statute." Rather, it is submitted, it will be sufficient evidence of the agreement.

[MAULE, J. The "charging" mentioned in section 4, refers not to the writing, but to the contract on which the action is brought. It is not necessary that the writing should charge.]

No; the contract is in existence before the writing or the signature. In *Crosby v. Wadsworth*, 6 East, 602, it was decided that the 4th section does not immediately avoid the contract; and in *Laythorpe v. Bryant*, 2 Bing. N. C. 735; s. c. 5 Law J. Rep. (N. S.) C. P. 217, Bosanquet J., remarks upon the difference in this respect between the

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wording of the 4th and 17th sections, for that the latter does avoid contracts not made in the manner there prescribed. If a parol agreement has been partly executed, courts of equity will compel a specific performance (1 Sugd. V. & P. c. 3, s. 7, p. 140,) and this could not be if the contract was to all intents and purposes void. The effect of the decisions in *Carrington v. Roots*, and *Reade v. Lamb*, is, that it is not necessary, in order that the statute should apply, that the action should be brought upon the agreement, but that it is enough if the effect of the action is to charge the defendant by means of the agreement; and the court said the plaintiffs there were seeking by a collateral and incidental mode to enforce the agreement. In deciding that this action cannot be maintained, the court will not preclude the plaintiff from any remedy he may have in equity, nor from suing in France, nor will it be any violation of the comity of nations; and if it were, the court is bound to enforce the act of parliament. *Lopez v. Burslem*, 4 Moore, P. C. 300.

[MAULE, J. If the meaning of an act is doubtful, it is a reason for not putting a particular interpretation upon it, that that interpretation would violate the comity of nations. In *The Sussex Peerage case*, 11 Cl. & F. 85, the House of Lords said, assuming (as they did, and I think rightly) that the legislature meant, whatever words were made use of in the 12 Geo. 3, c. 11, to invalidate such a marriage as the one then in question, that the act must be carried into effect although the marriage was valid abroad.]

They also cited *The General Steam Navigation Company v. Guitou*, 11 Mee. & W. 877; s. c. 13 Law J. Rep. (N. S.) Exch. 168; *Ferguson v. Fyffe*, 8 Cl. & F. 121; *Don v. Lippman*, 5 Cl. & F. 1; *Brown v. Thornton*, 6 Ad. & E. 185; s. c. 6 Law J. Rep. (N. S.) K. B. 82; *Dobell v. Hutchinson*, 3 Ad. & E. 355; s. c. 4 Law J. Rep. (N. S.) K. B. 201; *Davis v. Trevannion*, 2 Dowl. & L. P. C. 743; s. c. 14 Law J. Rep. (N. S.) Q. B. 138; *Adam v. Kerr*, 1 Bos. & P. 360, and Story's Conflict of Laws, p. 634 and 635.

Allen, Serg. referred to 2 *Boullenois Traité de la Personnalité*, tit. 4, c. 2, observ. 46:—"Ainsi deux particuliers contractent ensemble en présence de témoins, et sans écrit, dans un endroit où pareilles conventions forment de véritables engagements, et à raison de quoi la preuve par témoins est admise dans cet endroit pour quelque somme que ce soit même au dessus de 100 livres; ils plaident ensuite dans un lieu où cette preuve par témoins n'est pas admise; dans cette espèce je ne trouve pas de difficulté à dire qu'il faudra admettre la preuve par témoins, parceque telle preuve appartient ad vinculum obligationis et solemnitatem."

JERVIS, C. J. I am of opinion that this rule must be made absolute. There has been no discussion at the bar as to the principles which ought to govern our decision. It is admitted by the plaintiff's counsel, that if the 4th section of the Statute of Frauds applies, not to the validity of the contract, but only to the mode of procedure upon it, then that, as there is no "agreement, or memorandum, or

note thereof" in writing, this action is not maintainable. On the other hand, it is not denied that, if that section applies to the contract itself, or, as Boullenois says, to the "solemnities" of the contract, inasmuch as our law does not affect to regulate foreign contracts, the action is maintainable. On consideration, I am of opinion that the 4th section does not apply to the "solemnities" of the contract, but to the proceedings upon it; and therefore that this action cannot be maintained. The 4th section, looked at in contrast with the 1st, 2d, 3d, and 17th, leads to this conclusion. The words are, "no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or same memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." It does not say that, unless those requisites are complied with, the contract shall be void, but only that "no action shall be brought upon it;" and, as put by Mr. Honyman with great force, the alternative, requiring the "agreement or some memorandum thereof" to be in writing, shows that the legislature contemplated a contract, good before any writing, but not enforceable without the writing as evidence of it. This view, which the words of the statute present, is also, I think, in conformity with the authorities. The cases cited by the very learned author of the Law of Vendors and Purchasers, and the practice of the courts of equity, show that if any writing be subsequently made and signed by the party to be charged with the agreement, there is a sufficient compliance with the 4th section to enable the other party to enforce the agreement. Authority and practice, therefore, are both in conformity with the words of the statute. But it is said that the cases of *Carrington v. Roots*, and *Reade v. Lamb*, are inconsistent with this view. It is sufficient to say that the attention of the learned judges who decided those cases, was not directed to the particular point raised by the present case. What the court said in those cases was, that for the purposes of the action in those particular instances, there was no difference between the effect of the 4th and the 17th sections. It must not be forgotten that the meaning of those sections has been explained in other cases. In *Crosby v. Wadsworth*, Lord Ellenborough says, "The statute," that is, the 4th section, "does not expressly and immediately vacate such contracts if made by parol; it only precludes the bringing of actions to enforce them." The same view is adopted by Tindal, C. J., and Bosanquet, J., in *Laythorpe v. Bryant*, from which it appears that the contract is good antecedent to any writing, and that the effect of the 4th section is, not to avoid it, but to bar the remedy upon it, unless there be writing. I therefore think that an action on the contract in this case will not lie in this country, because the 4th section relates merely to the mode of procedure, and not to the validity of the contract. This view is not inconsistent with what has been cited from Boullenois, who is speaking of what pertains "*ad vinculum obligationis et solemnitatem*," and not of what relates to the mode of procedure.

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MAULE, J. I am of the same opinion. This action is brought upon a contract not to be performed within a year, and the contract is not in writing; it is, therefore, within the plain words of the 4th section. The objection to the application of that section to this case is, that the contract was entered into in France. Now, that section does not say in literal terms that the contract shall have no force, but that no action shall be brought upon it, referring, of course, to something which is to take place in courts where the English law prevails. Then it is said that there are cases in which it has been held that the terms "no action shall be brought," are equivalent to saying the agreement shall be void. Suppose it were held as a general proposition that those terms had that effect, still it would not be a legitimate mode of construing the 4th section, to substitute the equivalent for the actual terms. If the substituted terms are equivalent, then it is idle to substitute them; but if they are not, that is sufficient to show that we ought to adhere to the actual terms. Although the words "no action shall be brought," may, on a great number of other occasions, be equivalent to saying "the contract shall be void," yet, for the purpose of this particular occasion, they are not equivalent, for there is nothing in the section to prevent proceedings upon this contract being taken in the French courts, for that section does not affect to regulate foreign contracts. There is no difficulty in dealing with the very words used; and all we now say is, that we will not enforce this contract unless it or some note or memorandum of it is in writing; in like manner as we should not enforce it unless it were sued upon within six years, although possibly the law of France might allow a much longer period within which an action might be brought.

TALFOURD, J. I think Mr. Honyman's argument, drawn from *Laythorpe v. Bryant*, and those cases which decide that the writing required by the statute, may be a letter from the party to be charged to a third person, containing the terms of the agreement, conclusively shows that the 4th section does not render the contract absolutely void, but only applies to the mode of procedure upon it.

Rule absolute.

GRAY v. COOMBES.¹

November 11, 1850.

Name — Idem Sonans — Mute Letter.

The omission of a letter in the name of a party in the title of an affidavit, the word remaining *idem sonans*, is no ground for discharging a rule obtained upon such affidavit.

THE *venue* in this case, which had originally been laid in Middlesex, was removed to Hampshire, at the instance of the defendant, upon the ordinary affidavit.

Simon now moved to discharge that rule, and to restore the *venue* to Middlesex, upon the ground that the rule to change it was obtained upon an affidavit not intituled in the proper cause, the title of the

¹ 10 Common Bench Rep. 72.

Gapp v. Robinson.

affidavit being "*Gray v. Coombs*." [MAULE, J. Have you any authority to show that the omission of an *e* mute in the name of a party, vitiates an affidavit?] There certainly is no authority to that precise point.

MAULE, J. Then there can be no rule.

Rule refused.

GAPP v. ROBINSON.¹

November 6, 1852.

Practice — Process.

An original writ of summons expired on the 8th of October before the Common Law Procedure Act came into operation. In order to save the Statute of Limitations, the court directed an *alias* writ to issue under the Uniformity of Process Act.

LUSH applied to the court for directions to the Master. The writ in this case was issued on the 8th of June and expired on the 8th of October. Under the Uniformity of Process Act, 2 Will. 4, c. 39, s. 10, the plaintiff would have had till the 8th of November, to issue an *alias*. The 15 & 16 Vict. c. 76, came into operation on the 24th of October. Section 10, repeals the 2 Will. 4, c. 39, so far as relates to the duration of writs, "except so far as may be necessary for supporting any writs that have been issued before the commencement of this act, and any proceedings taken or to be taken thereon." Section 12, enacts that "where any writ of summons in any such action shall have been issued before, and shall be in force at the commencement of this act, such writ may, at any time before the expiration thereof, be renewed under the provisions of, and in the manner directed by this act, and where any writ issued in continuation of a preceding writ according to the provisions of the said acts, 2 Will. 4, c. 39, shall be in force and unexpired, or where one month next after the expiration thereof shall not have elapsed at the commencement of this act, such continuing writ may, without being returned *non est inventus*, or entered of record, according to the provisions of the said act, 2 Will. 4, c. 39, be filed in the office of the court within one month next after the expiration of such writ, or within twenty days after the commencement of this act;" and the original writ may thereupon be renewed. The writ in the present case was not in force on the 24th of October, and therefore does not come within the first branch of section 12. Nor was it issued "in continuation of a preceding writ," and therefore the second branch of the section does not apply.

[JERVIS, C. J. And, therefore, on first impression, I should say it is within section 10. The subject is now under discussion among the judges. I understand that the Masters of this court, and those of the Exchequer, are acting on the idea that section 10 applies to cases like this, and therefore an *alias* will issue.]

Per Curiam.

Direction accordingly.

¹ 22 Law J. Rep. (N. S.) C. P. 5; 16 Jur. 977.

 Barringer v. Handley.

BARRINGER v. HANDLEY.¹

November 16, 1852.

Practice — Order in Lien of Distringas — Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 17.

Orders under the 17th section of the Common Law Procedure Act will in general be granted absolute in the first instance, and need not be served.

PRENTICE moved for an order, under the 17th section of the Common Law Procedure Act,² that the plaintiff be at liberty to proceed as if personal service of the writ of summons had been effected.

The affidavits stated that, on the 11th of October, the defendant gave his address to the plaintiff's attorney, as at 97 High Street, Whitechapel, in the county of Middlesex, but that when application was made there for the purpose of serving the writ, it was found that the defendant had only an address at the house for the purpose of receiving letters, and that he carried on business in Tooley Street, Southwark. Attempts were made on several occasions to serve the defendant at his place of business in Tooley Street, but without success, and finally a copy of the writ was inclosed in a letter addressed to the defendant, and left for him, on the 4th of November, at 97 High street, Whitechapel. It was afterwards ascertained that the man with whom it was left had given it to the defendant; and subsequently the clerk of the defendant's attorney called on the plaintiff's attorney with a copy of the writ in his hand, and offered terms of settlement, and the defendant's attorney also wrote to the plaintiff's attorney for the same purpose. It also appeared from the affidavits, that no appearance had been entered for the defendant on the day previous to this motion.

[JERVIS, C. J. Do you move for an order absolute in the first instance?]

Yes. It is submitted that reasonable efforts have been made to effect personal service, and it appears that the writ has come to the knowledge of the defendant, and that he has not appeared. If the court is satisfied of that, the plaintiff is entitled to this order.

¹ 22 Law J. Rep. (N. S.) C. P. 6; 16 Jur. 1023.

² The 17th section of the 15 & 16 Vict. c. 76, is as follows:—"The service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply, from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit."

Doe d. Wilton v. Beck.

JERVIS, C. J. It is desirable that the practice should be uniform, and I will consult the Court of Exchequer on the subject.

[His lordship left the court, and on his return, said,]

I have seen the Lord Chief Baron and Mr. Baron Parke, and we think that the order ought to be absolute in the first instance in this case, though cases may arise in which we may feel ourselves justified in calling upon the other side to show cause. This proceeding is in lieu of a *distringas*, which would have given the defendant notice, and he might have come to the court to have it set aside. This order need not be served, as I think due diligence has been used. The great object of the alteration of the law in this matter was, to save unnecessary expense; and if the defendant has knowledge of the writ and evades service of it, he has had every notice that can equitably be required.

*Per curiam.*¹

Order absolute.

DOE d. WILTON & MARY HIS WIFE v. BECK & others.²

Nov. 6, 1852.

Amendment — Ejectment — 3 & 4 Will. 4, c. 42, s. 23 — Variance.

The declaration in ejectment stated a joint demise by H. and M., his wife. Proof that H. was devisee in trust for the sole use of M.: —

Held, that the judge had no power under the 3 & 4 Will. 4, c. 42, s. 23, to amend the record by striking out the name of M. in the demise.

Scam, (per MAULE, J.) That the variance was in a particular material to the merits.

EJECTMENT tried before Williams, J., at the last summer assizes at Worcester. The plaintiff claimed under a joint demise by H. W. and Mary his wife. At the trial it appeared that H. W. was devisee in trust for the sole use of Mary. The defendant objected that this was a fatal variance, as the demise assumed that Mary had the legal estate. The plaintiff then applied to the judge to amend the record by striking out the name of Mary from the demise. The learned judge, being of opinion that he had no power to do so under the 3 & 4 Will. 4, c. 42, s. 23, and also that if he had, the variance was in a particular material to the merits, refused to amend. The plaintiff was thereupon nonsuited, and leave was reserved to him to move to set it aside and enter the verdict for him, if this court should be of opinion that the amendment ought to have been made.

Alexander (Gray with him) now moved accordingly. The 23d

¹ JERVIS, C. J., MAULE, J., WILLIAMS, J., and TALFOURD, J.

² 22 Law J. Rep. (N. S.) C. P. 6; 16 Jur. 1142.

Feddon v. Sawyers.

section enacts that it shall be lawful for the judge to amend the record when any variance shall appear between the proof and the recital, or setting forth, on the record "of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his defence." This case comes within the words the "setting forth of a name."

[MAULE, J. I think it is not within the statute. The name, Mary, is truly set forth, only it turns out that she has not the legal estate, as asserted in the demise. It would be, in fact, amending the name of the plaintiff, for from the record it would appear that the husband only claimed in right of his wife.]

If the judge had no power to amend he had no discretion to exercise; but if he had the power, then the variance was not material to the merits. In *Doe d. Marriott v. Edwards*, 1 Moo. & R. 321, the allegation in the demise was that the premises were situate in the parish of A. and B.; the proof was that part were situate in A. and the residue in B. The judge allowed the description to be amended. That case is in the plaintiff's favor so far as it goes.

[MAULE, J. The plaintiff has only an equitable estate; the record says she has the legal estate; I am disposed to think that is a variance in a particular material to the merits: The defendant came to contest that the wife had the legal estate.]

JERVIS, C. J. I do not think that this is a case to which the statute applies.

*Per Curiam.*¹

Rule refused.

FEDDON, appellant; SAWYERS, respondent.²

November 25, 1852.

Parliament — List of Voters — Objector's description — List of Freemen — 6 & 7 Vict. c. 18, ss. 17 and 101, Construction of.

The respondent, claiming a vote for the city of C., received a notice of objection from the appellant, who described himself therein as "on the list of freemen for the city of C." It appeared that besides the list of freemen for the city entitled to vote for members of parliament, there was a list called the Freemen's Roll, kept for municipal purposes: —

Held, that the revising barrister was right in deciding that the notice was sufficient, under the 17th section of the 6 & 7 Vict. c. 18, as affirming that the objector was on the list of freemen entitled to vote. *Dissentiente*, MAULE, J.

A CASE was stated for the opinion of this court, of which the following are the material facts.

¹ JERVIS, C. J., MAULE, J., and TALFOURD, J.

² 22 Law J. Rep. (N. S.) C. P. 15; 17 Jur. 141. Appeal from Revising Barrister's Court.

Feddon v. Sawyers.

CASE. At a court held, before the revising barrister, duly appointed to revise the list of voters for the city of Carlisle, for the revision of the list of freemen entitled to vote in the election of members for the said city, John Sawyers, whose name was on the register of voters for the said city, for the time being, objected to the name of T. Feddon being retained on the list of freemen entitled to vote. The name of T. Feddon was on the list, published by the town clerk, of persons entitled to vote. Notices of objection had been duly served on the town clerk and on T. Feddon. But the notice of objection which had been so served on T. Feddon, was in the words and form following:—

“Form of notice of objection to be given to parties objected to.

“To Mr. Thomas Feddon, of Cushwaite.

“I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members of the city of Carlisle.

“Dated the 23d of August, 1852.

“(Signed) JOHN SAWYERS,

“Botchergate, Carlisle.

“On the list of freemen for the city of Carlisle.”

It was proved that there are several townships in the city of Carlisle, with separate overseers, and that the overseers of the different townships make out and publish different lists of persons entitled to vote in the election of members for the city in respect of the occupation of property within the city. That the town clerk makes out and publishes in each year a list of freemen entitled to vote in the election of members for the city. The heading of the said list of freemen is in manner and form following:—“The list of freemen of the city of Carlisle, entitled to vote in the election of members for the said city.” It is the duty of the town clerk to keep printed copies of the said list for sale, and he is in the habit of selling such copies. There is kept in the town clerk’s office another list of the freemen of Carlisle, which is the list or roll of all the freemen of the city made and kept in pursuance of the Municipal Corporations Act. The proper and ordinary name of such list is “The Freemen’s Roll.” Such list is not published, though it may be inspected at the town clerk’s office; and it is in no way connected with the lists made of persons entitled to vote in the election of members for the city. There is but one list of the freemen of the city relating to the election of members for the city, which is the list made and published annually by the town clerk as above mentioned. The name of John Sawyers was in fact upon that list of freemen. It was contended, on behalf of the said T. Feddon, that the notice of objection was insufficient, because the objector had not therein described himself as being a voter for the city, and had not shown upon the face of the notice that he was a person entitled to object to the name of the said T. Feddon being retained on the list of voters, and had not shown that he was a person to whose objection the said T. Feddon was bound

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by law to pay attention. It was further contended that the notice was insufficient, because the objector had not described himself as being on the list of freemen entitled to vote for the city, but only as being on the list of freemen for the city; and that the notice was not according to the form in the schedule, 6 & 7 Vict. c. 18, and that the said notice tended to mislead the said T. Feddon; and that the said J. Sawyers had not duly exercised the power conferred upon him by the statute 6 & 7 Vict. c. 18. It was contended, on behalf of the said J. Sawyers, that he had duly exercised the power conferred upon him by law, that the notice was sufficiently accurate, that the voter could not be misled, and that there was only one list of freemen, namely, the list of freemen entitled to vote in the election of members for the city, to which any reasonable person would refer on receiving such a notice. The revising barrister held that the notice was sufficiently accurate, and that the said J. Sawyers had duly exercised the power conferred upon him by law, and that the said T. Feddon, being unable to sustain his right to be on the list of voters for the city of Carlisle, the barrister struck his name out of the list.

S. Temple (Nov. 17), for the appellant. The revising barrister was wrong in holding the notice of objection sufficient. The question arises upon the 17th section of the 6 & 7 Vict. c. 18, which provides that any person whose name shall have been inserted in any list of voters for any city or borough may object to any other person as not being entitled to vote, and shall give a notice according to the form numbered 10 in the schedule B, of this act, "or to the like effect," to the overseers of the parish (or in boroughs to the town clerk), and a notice to the person objected to according to the form numbered 11 in schedule B, and that the notice of objection shall be signed by the party objecting. In both the forms given in schedule B, of the act, the notice is signed in these words—" (Signed) A, B., of [place of abode], on the list of voters for the parish of —." The objection raised to the notice in this case is, that the party objected to has a right to know that the objector is a person who, being himself a voter, is entitled to object. The objector, therefore, ought to have described himself as being on the list of freemen entitled to vote at the election of a member of parliament, and not merely on the list of freemen for the borough. It appears that there is, in the borough of Carlisle, a list of freemen for municipal purposes only; and it is not, therefore, sufficiently shown, on the face of the notice, that the objector was entitled to make this objection.

[JERVIS, C. J. When I first read this notice I thought that the words "List of freemen for the city of Carlisle" meant the list of freemen entitled to vote for the city. Now, it is provided by the 101st section of the 6 & 7 Vict. c. 18, "that no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with respect to such person, place or thing,

provided such person, place, or thing, shall be so denominated in such schedule, list, register, or notice as to be commonly understood." It appears to me that the notice in this case would be commonly understood as alleging that the objector was on the list of freemen entitled to vote.]

The object of the act, as appears from the decided cases, was to give voters as little trouble as possible, and therefore the objector should, on the face of his notice, show that he is a person entitled to object. In this case, the objector might be on the list of freemen for municipal purposes, but not on the list of freemen entitled to vote for members of parliament. In the case of *Eidsforth, appellant*, and *Farrar, respondent*, 4 Com. B. Rep. 9; s. c. *nom. Farrar v. Edsworth*, 16 Law J. R. (N. S.) C. P. 132, a notice which described the objector as being on the list of voters, where there were householders' lists and a freemen's list, was held to be bad, and not cured by the 101st section of the statute. Supposing a party receiving a notice, such as was given in this case, looks to the list of freemen voters, finds the same name as the objector's there, though it is that of another person, and consequently takes the trouble to go to the revising barrister's court to support his vote, he may find there that the real objector is not on the voter's list, and that he therefore withdraws his objection. Or if the party objected to has such a notice as this from J. S., but has reason to think the J. S. giving the notice is not the same J. S. as he finds on the voters' list, and he consequently refrains from going before the revising barrister, then on proof of the notice of objection, the revising barrister would decide against the vote. These illustrations show the necessity for stating on the face of the notice, that the objector is on a list of persons entitled to vote, and on what list he is. The form given in the schedule to the act shows that the description is material, and there is nothing in the allegation here given which, within the meaning of the 17th section, is "to the like effect" as the statement that the objector was on the list of freemen entitled to vote.

Mellor, for the respondent. The notice of objection is quite sufficient of itself; but if it is not exactly correct, its only fault is an "inaccurate description," which is cured by the 101st section of the act. There is a class of cases in which notices of objection have been held bad for not referring to the particular list on which the objector's name appears; but in those cases there were several lists, and the party objected to did not know to which he was to refer. Those very cases will show, on examination, that a description, such as is given here, is sufficient. In those cases, too, the 101st section did not apply, because in them no description at all was given. It is conceded that there are two lists of freemen in the borough of Carlisle, as in other boroughs. One of those lists contains the names of those who have municipal privileges, and is known by the name of the "freemen's roll."

[MAULE, J. That roll is a list, and you contend that a man who says he is on the list of freemen for the borough of Carlisle, means that he is entitled to vote for the borough of Carlisle.]

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In *Wansey, appellant, and Perkins, respondent*, 7 Man. & G. 129; s. c. 14 Law J. Rep. (N. S.) C. P. 60, it was held that the notice of objection given to the party objected to, need not point out the list in which the objector's name is inserted.

S. Temple, in reply. This is not an "inaccurate description" to which the 101st section can apply.

[JERVIS, C. J. Does not the 101st section mean that the court shall not quibble about the words employed on such documents, but take a common sense view of them?]

The object of the provision in the 17th section was to enable the party objected to to see whether the objector was entitled to object, and it was intended that the party objecting should pledge himself in writing that he was entitled to vote, and therefore entitled to make the objection.

Cur. adv. vult.

The judges, differing in opinion, now delivered their judgments *seriatim*.

JERVIS, C. J. In this case a difference of opinion having existed on the bench, we have considered the matter again, and I am sorry to say we are not yet unanimous. I proceed to state the reasons why I think the revising barrister was right in his decision. The question which arises in this case is on the sufficiency of the notice of objection to the vote of T. Feddon, signed by John Sawyers, who described himself as being "on the list of freemen for the city of Carlisle." It is said that the objector should have described himself as on the list of freemen entitled to vote for the city, or should have, in substance, shown himself to be a voter for the city. On the other hand, it is contended that the objector described himself sufficiently in his notice. It has been suggested, and not disputed, that the meaning of the 17th section of the act is, that no person has a right to object but a person whose name is on a list of voters, and that parties objecting must bring themselves within that description. The statute provides that the notice of objection shall be given in a form appended in a schedule to the statute, or "to the like effect." The form contained in the schedule is not applicable to the case where the objector has a right to vote as a freeman, but to one whose qualification is that of a householder. The question turns, therefore, on the construction of the 17th section of the act. The 101st section gives a key to the interpretation of the other. The meaning of that section is, that no notice of objection is to be held bad if the matter is so stated in it as to be commonly understood. I think the fair construction of the act is, that we are not to put a mere technical and critical construction upon the instrument, but to look at it in a common sense view, reference being had to the subject-matter, in the way in which a man of ordinary intelligence would understand it; and, looking at it in this way, I think that the notice of objection is good. There are two classes of lists in the city of Carlisle, to which we have to refer

for the purposes of this inquiry. The one includes the list of freemen entitled to vote. The other class contains the list of householders made out by the overseers of the different parishes, in which case it is necessary to state in which parish the respective voters are householders. That list does not apply to freemen. There is only one list of freemen published by the town clerk, and the persons named in that list are entitled to vote at elections of members of parliament. There is only one parliamentary form of notice of objection given, and that does not apply to freemen. I think that if the notice in this case be read as it would be by a person of ordinary intelligence, seeing that the objector is stated to be on the list of freemen for the city of Carlisle, it cannot be otherwise understood than that the objector was a freeman on the list of voters. It seems to me, from the 101st section, that we should take a liberal view in construing the statute; and looking at it in that way, I think it is so expressed that it must be "commonly understood" as being made by an objector who is a voter. I quite agree that if we were bound to draw inferences against the objector, the statement in the notice is quite consistent with the objector's being on the roll of freemen without being entitled to vote; but we are not bound to draw such inferences, and when we consider that this is a notice of objection to the parliamentary franchise, we cannot but infer that the objector was himself a voter entitled to object. It was urged that, by holding as I do, a party is called upon to do something he ought not to be obliged to do, in making inquiry. In fact, that argument was strongly pressed in *Wansey v. Perkins*, but the objection was held not to be a fatal one. There, too, it was not pointed out where inquiry should be made. In a case like this, if there was any ambiguity, the party objecting to the notice might be fairly required to ascertain whether the name of the party giving it was on the list of freemen entitled to vote. For these reasons, I am of opinion that the notice was sufficient, that the revising barrister was right, and that the appeal should be disallowed.

MAULE, J. It appears to me that the notice of objection in this case was not sufficient. The 17th section of the act confines the power of objecting to persons who are voters. Such persons, and such persons alone, have the right of objecting conferred upon them. This right is annexed, by force of the statute, not to persons to whom it was naturally incident, but to persons to whom the statute thinks fit to give it. Such persons are required by sect. 17, to give a notice of objection in the form or to the intent pointed out by the schedule. The latter words of that form are "(Signed) A. B. of —, in the list of voters for the parish of —." The 17th section directs the notice to be in the form prescribed in the schedule, or "to the like effect." The form is given as an example, and shows that the object is to point out that the objector is on a list of voters, and on what list he is. There is no controversy that the correct form pointed out by the words of the statute as applicable to the case of a person not being on the list of the parish overseers as a householder, but who is

on the list of freemen, ought to show that he is on that list. It is agreed that this is the effect which the notice ought to have in that case. The judges agree that the effect of the notice, to make it a good one, ought to be that it gives notice that the person making the objection is upon the list of freemen entitled, as such, to vote. What he does say is, that he is on the list of freemen; but he does not say in terms that he is entitled to vote; and it is conceded that he must say that in effect. Now the words of themselves, standing alone, do not comprehend any assertion of a right to vote, or of the objector's being on a list of persons entitled to vote. A person speaking of a freeman of a borough is not to be understood as speaking of a freeman entitled to vote. But it is said, that taking the surrounding circumstances into consideration, and the rule which is said to be applicable according to the 101st section, the language here used "on the list of freemen for the city of Carlisle," does contain impliedly an assertion that the person is on the list of freemen entitled to vote for members of parliament for the city of Carlisle. That there may be a list of freemen not entitled to vote is not denied; but it is said that though the objector here was said to be on the list of freemen, it would be understood that he referred to the list of freemen entitled to vote. These being the only grounds for suggesting that a construction should be put on the words which does not belong to them by themselves, the question is, whether the reason be sufficient for putting such a construction upon them. The revising barrister seems to have relied a good deal on that, on which not so much reliance has been placed in the argument and in the judgment of the Lord Chief Justice, namely, that there are certain lists of persons made out and entitled in a certain way, and that there exists a list of freemen called "The Freemen's Roll." These circumstances, I do not think can be legitimately taken into consideration; and if they be taken into consideration, I do not think they ought to lead to the conclusion drawn from them by the revising barrister. The words themselves are perfectly intelligible; they mean that the objector is a freeman on a list of freemen, and I do not think that the meaning of such unequivocal words can be restricted. It cannot be restricted by the extrinsic fact that there is a list which contains the names of part of the freemen only. The rule of construction contended for, if carried out to the length short of which we could not stop, would have the effect of restricting words, however unequivocal, to a particular sense. It appears to me, therefore, that the occasion on which these words were used cannot be called in aid to restrict the plain meaning belonging to the words when read by a person well conversant with the English language, and who has no desire to give one construction to them rather than another. If they be so read, no one can doubt that the person giving the notice affirms himself to be upon a list which may be, or may not be, a list of voters. But it is said that the other construction is aided by the 101st section of the act, and that we are to look at the matter in a common sense way, and not technically or critically. There is nothing technical, belonging to any art or science, suggested as the rule which is to be applied. The words are

to be properly looked at, not as words belonging to the art of law or any other art, but according to the sense which the English language gives them. I think they must be dealt with critically. To deal with words critically is to apply judgment to ascertain the meaning of them. The Lord Chief Justice himself has, in truth, used great critical power in his judgment. There are certain words used here; and the question is, what sense is to be put on those words. It is said that there is a section of an act of parliament (the 101st section of the 6 & 7 Vict. c. 18) which enables us to impose upon the words a sense different from that which, without that section, we should give to them. Now, I think, that the meaning of the rule to which that section refers is, that where a document contains a substantial allegation of the matters which it is required to contain, if the language in which it is expressed be not perfectly accurate, that inaccuracy may be got over. Now, does that rule apply to the present case? Certainly it does not. There is no inaccuracy, no obscurity, no difficulty in the language used. The person using it affirms of himself that he is on the list of freemen for the city of Carlisle. There is nothing inaccurate in that. There is such a list, and the objector affirms that he is on that list. He may wish to affirm that, and not that he is on the list of voters; and he may wish to try whether that is a sufficient allegation. If it had been necessary that the party objecting should show that he was on this general list of freemen, and it were not sufficient to state that he was on the list of freemen entitled to vote, it would have been hopeless to urge in argument, that, by any rules of construction, or any consideration of the surrounding circumstances, the statement made in the present case was bad as respected the general list, on the ground that it was an assertion that the party was on the particular list of parliamentary voters. If the construction contended for by the respondent be adopted, it is difficult to say where we are to stop. People, it seems, are to be taken to know, that to be on the list of freemen, means to be on the list of freemen entitled to vote; and, therefore, we are to restrict the meaning of the words used, and impose upon them a meaning which of themselves they have not. I think that the words should be looked at in the spirit of the act. It is evident that the act intended that the power to object should be given to a certain class of persons only. Now, if words be used on an occasion when they cannot have any meaning at all, unless restricted in their signification, then they must be so restricted; but that is not the case here. Suppose the objector had said he was an inhabitant of the borough, that would not have done. The words here are intelligible, and have a good plain meaning; and there would be no inconvenience or inconsistency in giving them their right meaning. But it is said that we are to prefer a meaning which is not natural to the words. That is going a great deal further than any rule of construction requires. No inconsistency or inconvenience can arise from giving to the words used in this case their plain common sense meaning, which properly belongs to them. They affirm that the objector is on the list of freemen for the city of Carlisle, but not that he is on the list of freemen entitled

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to vote; and I therefore think that the notice of objection was not sufficient, and that the revising barrister was wrong.

WILLIAMS, J. I agree with my Lord Chief Justice in thinking that the revising barrister was right in holding the notice sufficient. Having regard not only to the terms of the notice, but to the subject-matter, and the occasion on which it was given, I think that the allegation means that the objector was on the list of freemen entitled to vote.

TALFOURD, J. I agree with the Lord Chief Justice and my brother Williams. The 17th section requires that the objector should state his title to object. By the giving of the notice itself, he affirms, in fact, that he is a person entitled to object. The form given in the schedule, for voters on the parish lists, is clearly inapplicable to freemen. If there had been no other list than that of freemen entitled to vote, I think we all agree that the present notice would have been sufficient. The other list is called "The Freemen's Roll," and this is called "The List of the Freemen for the City," pointing rather to persons who are voters than to those who were merely on the freemen's roll. But the fact of the objector's giving notice of the objection, shows that he claims a right to object as a voter on the list of freemen; and I therefore think, that the notice is good, without taking into consideration the 101st section of the act.

Decision of revising barrister affirmed, without costs.

HAMILTON, appellant; Bass, respondent.¹

November 12, 1852.

Parliament — County Vote — Forty Shilling Freehold — Landlord's Repairs — 8 Hen. 6, c. 7 — 10 Hen. 6, c. 2 — 18 Geo. 2, c. 18, s. 5.

The appellant claimed, with twenty-nine other persons, to vote in respect of certain freehold premises which were let at a gross rent. During the six preceding years the landlords had voluntarily paid for repairs:—

Held, that the question whether the annual value of the freehold was reduced by such payments below 60*l.*, depended upon the rent which could be obtained if the tenant had to keep the premises in repair; and that the revising barrister, having found that the rent which could be obtained in that case would be less than 60*l.*, the several persons in whom the freehold was vested were not entitled to vote.

CASE. At the court, held before the revising barrister appointed to

¹ 22 Law J. Rep. (N. S.) C. P. 29; 17 Jur. 115. Appeal from Revising Barrister's Court.

revise the list of voters for the county, for the revision of the list of voters for the township of Caldewgate, William Bass, whose name was on the register of voters for the county for the time being, duly objected to the name of John Hamilton being retained on the list for the township of Caldewgate. John Hamilton was registered to vote in respect of one undivided thirtieth part of a freehold dwelling-house, dwelling-rooms, bakehouse, school-room, and reading-room, in Church-street and Bread-street. The facts of the case were as follows: In 1846, a conveyance of the property in question was duly executed to the use of the voter and twenty-nine others in fee. The purchase-money was advanced in equal portions by each of the thirty persons in whose favor the conveyance was made. Immediately after the purchase the property was let on behalf of the purchasers, at a gross rent of 75*l.* 15*s.*, with an agreement that the landlords should pay all rates and taxes. The tenants were rated to all the usual tenants' rates, which were in this case the poor rate and other parochial rates, amounting to 10*l.* 10*s.* 10*d.*, and a lighting rate, and rate called the "Board of Health Rate," amounting together to 2*l.* 0*s.* 7*d.* in the year. All these rates, in pursuance of the terms of the letting, were paid by the landlords; though, but for the agreement, these rates would all have been payable by the tenants, and the rental of the property would have been diminished by the amount of the rates. Besides these rates, there had been an expenditure on behalf of the landlords in each year, in order to keep the premises in sufficient repair. This expenditure had been in the last year so large as to reduce the resulting share of each landlord to less than 40*s.*; but in other years it had been small enough to leave the return to each landlord higher than 40*s.* The average expenditure for repairs, upon the six years from 1846, had been 4*l.* in the year; such a sum by the year upon an average was necessary to be expended in repairs by the landlords, in order to enable them to procure the rent of 75*l.* 15*s.* There was a further annual expense to the landlords for collecting rents, and which was a necessary expense, of 1*l.* 6*s.* A manager had been appointed on behalf of the landlords, who had in each year collected the rents, paid the expenses, kept the accounts, divided the profits, and transmitted to each landlord his resulting share. Upon this state of facts, it was agreed on both sides, that the annual rent which a solvent tenant would give for the property, in its then condition, must in this case be taken to be 63*l.* 3*s.* 7*d.*, and that the sum of 1*l.* 6*s.* was a charge payable by the landlords in respect of the property which ought to be deducted; but it was contended, on behalf of the voter, that the sum of 4*l.*, being the average expenditure for the necessary repairs as aforesaid, ought not to be treated as a charge payable by the owners in respect of the property, and that it ought not to be deducted; whilst it was contended, on behalf of the objector, that the average expenditure of 4*l.* for necessary repairs, was a charge payable by the owners in respect of the property which ought to be deducted. The revising barrister held, that the true measure of the annual value of the property in this case was the gross rent, less the usual tenants' rates mentioned, and that the annual charge for collect-

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ing was a charge which ought to be deducted; and, further, that the average annual expenses for necessary repairs was also a charge payable by the owners in respect of the property which ought to be deducted, in order to determine the annual value of the property to the owners. If the sum of 4*l.* was deducted, the resulting share to each owner was less than 40*s.* by the year; if it was not, the share to each owner was more than 40*s.* The revising barrister held, that the share of each owner was of less value than 40*s.*, and struck the name of the voter from the list. There were several appeals which depended upon this decision, and were consolidated with it.

Mellor, for the appellant. The question is, are landlord's repairs a charge within the meaning of the statutes 8 Hen. 6, c. 7, 10 Hen. 6, c. 2, and 18 Geo. 2, c. 18, s. 5?

[MAULE, J. The land must be worth enough to enable the landlord to spend 40*s.* a year. Now, if a man is compelled to lay out 5*s.* a year upon the land to make it worth 40*s.* a year, how can the land be said to be worth 40*s.* a year?

JERVIS, C. J., referred to *Lee v. Hutchinson*, 8 Com. B. Rep. 16; s. c. 1 Eng. Rep. 329.]

A man has a house bringing in a rent of 5*l.* a year, but at the end of ten years he expends 6*l.* on repairs. How is the annual value to be ascertained? Is he to have a vote one year and not another? Is he disfranchised the last year or every year? In *Colwill v. Wood*, 2 Com. B. Rep. 210; s. c. 15 Law J. Rep. (N. S.) C. P. 160, it was held, that the meaning of "clear yearly value" in section 27, of the 2 Will. 4, c. 45, was the fair annual rent, without deducting landlord's insurance or landlord's repairs.

[JERVIS, C. J. The question there was, what was the clear yearly value of the house to the tenant, not to the landlord?

MAULE, J. In that case the repairs increased the value as regarded the tenant, for he enjoyed them without paying for them. But here the repairs lessen the value as regards the landlord; and the question is, what has the landlord?

He also cited *The King v. Framlingham*, Burr. S. C. 748.

Temple, for the respondents. The question does not depend upon the meaning of the word "charges," in the several acts. It matters not whether the landlord can expend 40*s.* any one year, if he cannot do so by the year.

[MAULE, J. Suppose a man occupies ground himself which he says is worth 40*s.* a year, because he grows corn on it which produces that sum, would it not be a good answer to say, you spend 20*s.* or 30*s.* in growing the corn, and, therefore, you are not in a position to spend 40*s.* a year? Putting manure on the ground is very analogous to repairing a house.]

Copland v. Bartlett, 18 Law J. Rep. (N. S.) C. P. 50; *Lee v. Hutchinson*, and *Beamish v. The Overseers of Stoke*, 21 Law J. Rep. (N. S.) C. P. 9, s. c. 7 Eng. Rep. 485, decide this case.

Lambert v. Overseers of St. Thomas, &c.

Mellor, in reply, cited *The King v. Ringwood*, 1 M. & S. 381.

JERVIS, C. J. The decision of the revising barrister is substantially correct, although I might hesitate to affirm it solely on the grounds urged before him. The question does not turn upon the meaning of the word "charges" in the 8 Hen. 6, c. 7, as the payment is clearly voluntary. The principle laid down in *Lee v. Hutchinson*, must decide the matter. If the tenant had to make the repairs, would he give 63*l.* a year rent? The revising barrister says he would only give 59*l.*, and that would be insufficient to constitute a qualification. In every case the question is one of fact. The revising barrister has found the fact, and, I think, correctly, that the value is reduced.

MAULE, J. I am of the same opinion. My reasons were expressed in the course of the argument, and were not answered.

TALFOURD, J., concurred.

Decision affirmed, with costs.

LAMBERT, appellant; OVERSEERS OF ST. THOMAS, NEW SARUM, respondents.¹

November 12, 1852.

Parliament — County Vote — Form of Notice of Objection — 6 Vict. c. 18, ss. 7, 101.

The 7th section of 6 Vict. c. 18, requires that a notice in the form set out in schedule A. annexed thereto, or to the like effect, should be served upon the person whose vote is intended to be objected to:—

Held, that a notice in the following terms, "Take notice, that I object to your name being retained on the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts," was sufficient notice to a person that his vote for the county would be objected to.

CASE. At the court, held before the barrister appointed to revise the list of voters for the southern division of the county of Wilts, for the revision of the list of voters for the parish of St. Thomas, New Sarum, John Lush Alford objected to the name of the said John Lambert, the appellant, being retained on the St. Thomas, New Sarum, list of voters for the southern division of the county of Wilts. The facts of the case were as follows:—The said John Lush Alford had duly served the appellant with a notice of objection, of which the following is a copy—"To Mr. John Lambert, of the parish of Mil-

¹ 22 Law J. Rep. (N. S.) C. P. 31; 17 Jur. 3. Appeal from Revising Barrister's Court.

ford, in the county of Wilts. Take notice, that I object to your name being retained on the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts. Dated this 24th day of August, in the year 1852. John Lush Alford, of New Street, in the parish of St. Thomas, New Sarum, on the register of voters for the parish of St. Thomas, New Sarum."

The appellant objected to the validity of this notice, because it was not according to the form numbered (5.) in the Schedule A, annexed to the act 6 Vict. c. 18, or to the like effect.

The revising barrister held the notice to be valid; and, upon the appellant declining to prove his qualification, expunged his name from the St. Thomas, New Sarum, list of voters.

If the court should reverse this decision, the St. Thomas, New Sarum, list was to be amended by restoring the name of John Lambert, as follows:—"Lambert, John—(Milford, Wilts)—two freehold houses—(High Street)."

The validity of seven other objections depended upon the same point of law, and the appeals in those cases were consolidated herewith.

Warren, for the appellant. The question is, whether the notice of objection was sufficient. The 6 Vict. c. 18, s. 7, requires the notice to be according to form 5, in schedule A, or to the like effect.

[JERVIS, C. J. The notice need not be in the exact form given by the act; it is sufficient if it make the party aware that his vote is objected to.]

Here the party could not know whether the objection was made to his borough or his county vote, and he consequently might have been misled. This is sufficient to invalidate the notice. *Allen v. House*, 7 Man. & G. 157; s. c. 14 Law J. Rep. (N. S.) C. P. 79; *Willott v. Davis*, 16 Law J. Rep. (N. S.) C. P. 185.

[TALFOURD, J. Those are cases of insufficient description of the objector.]

In *In re the Mayor and Assessors of Harwich*, 21 Law J. Rep. (N. S.) Q. B. 193; s. c. 10 Eng. Rep. 382, Crompton J., in the Bail Court, held, that a notice was insufficient under the 5 & 6 Will. 4, c. 76, s. 17, which did not describe the burgess objected to as he is described in the burgess list, on the ground that there might be two persons of the same name.

No counsel appeared on behalf of the respondents.

JERVIS, C. J. I am of opinion that the revising barrister decided rightly. The 7th section of the 6 Vict. c. 18, does not require the notice to be in the precise form given in the schedule; it is sufficient if it be to the like effect. Now this notice, in effect, says, I intend to object to your county vote, and the objection would be so "commonly understood," and therefore any inaccuracy there may be in it is cured by section 101.

MAULE, J. If we were to hold that this notice was insufficient, we should strip section 101 of all operation. Section 7, requires the

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notice to be to the like effect with the form given in the schedule; and then section 101, which is to be construed beneficially, says, "that no inaccurate description of any person, place or thing, &c., named or described in any notice required by this act, shall in anywise prevent or abridge the operation of this act, &c., provided that such person, place, or thing, shall be so denominated in such notice as to be commonly understood." Now, can it be contended that persons would not commonly understand the list mentioned in this notice to be the list of county voters, even admitting that there may be some uncommon person who would understand it otherwise?

TALFOURD, J., concurred.

Decision affirmed, without costs.

BELSHAW v. BUSH.¹

January 19 and June 22, 1852.

Debt — Payment by Stranger — Bill of Exchange — Pleading — Covenant not to sue for limited Time — Suspension of Right of Action.

To an action of debt on simple contract, the defendant pleaded, that after the accruing of the debts and causes of action, and before suit, the plaintiff drew a bill on one A. B., who accepted the bill, and delivered it to the plaintiff for, and on account of the said debts and causes of action, and that the plaintiff received it from A. B. on such account; that the plaintiff, before suit, indorsed the bill to C. D., who was still the holder and entitled to sue A. B. thereon:—

Held, a good answer to the action.

Wankford v. Wankford, 1 Salk. 299; *Ayliffe v. Scrimshire*, Carth. 63; s. c. Comb. 123, and *Stracey v. The Bank of England*, 6 Bing. 754; s. c. 8 Law J. Rep. C. P. 234, considered and explained.

DEBT, for 40*l.*, for goods sold and delivered; 40*l.* for work and materials; 40*l.* for money paid, and 40*l.* on an account stated. Damages, 10*l.*

Second plea (as to 33*l.* 10*s.*, parcel of the debts in the declaration mentioned, and the causes of action in respect thereof,) that after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on &c., the plaintiff made his bill of exchange in writing, and directed it to William Bush, the father of the defendant, and thereby required the said William Bush to pay to the order of the plaintiff 33*l.* 10*s.*, for value received, three months after date. That William Bush then accepted the said bill, and delivered it so accepted to the plaintiff for and on

¹ 22 Law J. Rep. (N. S.) C. P. 24; 17 Jur. 67.

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account of the said sum of 33*l.* 10*s.*, parcel of the said debts in the declaration mentioned, and the causes of action in respect thereof. And the plaintiff then received and took the said bill from William Bush for and on such account as aforesaid. That afterwards the plaintiff indorsed and delivered the said bill to W. F. Grey, who then became, and was before, and at the time of the commencement of this suit, the holder thereof, and entitled to sue William Bush thereon. Verification.

Replication, that the said bill of exchange in the second plea mentioned had become and was overdue and unpaid before the commencement of this suit, to wit, on &c., and that no part of the same money therein mentioned hath ever been paid. Verification.

General demurrer and joinder.

Quain, for the defendant, (Jan. 19). If the plea had alleged the bill to have been delivered to the plaintiff by the defendant instead of by William Bush, and had been in other respects such as it now is, it would have been good. *Price v. Price*, 16 Mee. & W. 232; s. c. 16 Law J. Rep. (N. S.) Exch. 99, and 2 Wms. Saund. 103, b; n. (c). So if the bill had been given by one jointly liable. *Mercer v. Cheese*, 5 Sc. N. R. 664; s. c. 4 Man. & G. 804; 12 Law J. Rep. (N. S.) C. P. 56, and *Maillard v. The Duke of Argyle*, 6 Sc. N. R. 938; s. c. 6 Man. & G. 40. The case of giving and accepting a bill of exchange for and on account of a debt or cause of action seems an exception to the rule that a personal cause of action once suspended is altogether gone; and a plea setting up a bill so given and accepted, though given by a perfect stranger, is a good plea of accord and satisfaction. *Jones v. Broadhurst*, 9 Com. B. Rep. 173, and Fitz. Abr. tit. "Barre," pl. 166. The doctrine of the Roman law and the *Code Civile* are both in accordance with this view of the law. The plea amounts to conditional payment, to be afterwards defeated in case the bill be dishonored. *Ford v. Beech*, 11 Q. B. Rep. 852; s. c. 17 Law J. Rep. (N. S.) Q. B. 114. If actual satisfaction be a good plea, conditional payment is good. The stranger could not plead want of consideration if the action were brought against him. The debt of a third person is a good consideration, on the ground that it is an agreement to suspend the remedy during the currency of the bill. The plea is, therefore, good, and the replication is bad. He also referred to *Forman v. Wright*, 20 Law J. Rep. (N. S.) C. P. 145; s. c. 4 Eng. Rep. 366; *Baker v. Walker*, 14 Mee. & W. 465; s. c. 14 Law J. Rep. (N. S.) Exch. 371; *Lechmere v. Fletcher*, 1 Cr. & M. 623; s. c. 2 Law J. Rep. (N. S.) Exch. 219; *Poplewell v. Wilson*, 1 Str. 264; *Ridout v. Bristow*, 1 Cr. & J. 231; s. c. 9 Law J. Rep. Exch. 48; *Walton v. Mascall*, 13 Mee. & W. 452; s. c. 14 Law J. Rep. (N. S.) Exch. 54; *Cumber v. Wain*, 1 Smith's Lead. Cas. 150, and *Good v. Cheesman*, 2 B. & Ad. 328; s. c. 9 Law J. Rep. K. B. 234.

Bovill, for the plaintiff. The plaintiff on the record has a clear cause of action; and it is said something has happened to defeat or suspend the remedy. It is clear that the defendant has done

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nothing to have that effect. He says a stranger has done something. This point was not decided in *Jones v. Broadhurst*; and there is no case to show that payment by a stranger can be a good accord and satisfaction. He then cited the following authorities — *Stedman v. Gooch*, 1 Esp. 4; *Kearslake v. Morgan*, 5 Term Rep. 513; *Simon v. Lloyd*, 2 Cr. M. & R. 187; s. c. 4 Law J. Rep. (N. S.) Exch. 195; *W Dowall v. Boyd*, 6 Dowl. & L. P. C. 149; s. c. 17 Law J. Rep. (N. S.) Q. B. 294, *Van Wart v. Woolley*, 3 B. & C. 439; s. c. 3 Law J. Rep. K. B. 51, and *Drake v. Mitchell*, 3 East, 251.

Quain replied.

Cur. adv. vult.

MAULE, J., now delivered the judgment of the court.¹ In this case it is first to be considered what is the true meaning of the plea; and, secondly, whether it be an answer to the claim to which it is pleaded — [his lordship then read the declaration and second plea]. We think that the words “33*l.* 10*s.* parcel of the debts in the declaration mentioned, and the causes of action in respect thereof,” on account of which the plea alleges the bill to have been delivered and received, must be understood to mean “33*l.* 10*s.*, parcel of the debts in the declaration mentioned, and the causes of action in the declaration mentioned in respect thereof,” that is the causes of action of the plaintiff against the defendant. The declaration shows debts for goods sold and delivered, &c., by the plaintiff to the defendant; and it is not to be presumed that there were any other causes of action in respect of such debts than those of the creditor against the debtor. In this respect the plea differs from that in *Jones v. Broadhurst*, where the action was by the indorsee against the acceptor of a bill of exchange, and the plea that the drawers delivered to the plaintiffs, and the plaintiffs accepted divers goods in full satisfaction and discharge of the bill of exchange, and of all damages and causes of action in respect thereof; and the court held that, the drawers being parties to the bill, and contingently liable to pay it, the satisfaction and discharge mentioned in the plea must be understood to apply to the liability as drawers of those who delivered the goods, and not to that of the defendants as acceptors. In the present case no liability of any one but the defendant, and no cause of action but those in the declaration appears. We think, therefore, that the plea is to be understood as meaning that William Bush gave, and the plaintiff took the bill on account of the defendant's liability to pay, and the causes of action which the plaintiff had against the defendant in respect thereof. Understanding the plea in that sense, the next question is, whether it be a good answer to the action. It cannot be questioned that it has been established by many decisions, that if the plea had alleged the bill to have been delivered to the plaintiff by the defendant, instead of by William Bush, and had in all other respects

¹ JERVIS, C. J., MAULE, J., CRESSWELL, J., and WILLIAMS, J.

been such as it now is, it would have been an answer to the action; but, as no case has been found in all respects resembling the present, it is contended that those decisions will not govern this case, by reason of this difference, and the rather, as those decisions have sometimes been considered as anomalous, and contrary to established rules of law—2 Wms. Saund. 103, *b*, *n*. (*c*.); that the ground of those decisions is, that the giving a bill on account suspends the right of action for the original debt, and that this is contrary to the rule that a personal action, once suspended by the act of the party, is gone forever, and also to the rule that a covenant not to sue for a limited time is no bar to an action. It will, therefore, be convenient to consider those rules of law, and the decisions which are said to conflict with them. The rule as to a personal action once suspended being gone, is referred to by Powell, J., in the terms above mentioned, in *Wankford v. Wankford*, in the 11 Will. 3, where it is applied to the case of, an obligee making the obligor his executor, which was held to extinguish the debt, so that an administratrix *de bonis non* could not sue the heir of the obligor; and the rule is undoubtedly of much greater antiquity, and has also been acted on in recent times, as in *Freakley v. Fox*, 9 B. & C. 130; s. c. 7 Law J. Rep. K. B. 148, and *Harmer v. Steele*, 4 Exch. Rep. 1; s. c. 19 Law J. Rep. (N. S.) Exch. 34. But it is not, and never was true, that in no sense, and under no circumstances, can a personal action be suspended; for though a simple covenant or agreement not to sue for a limited time be not a bar to an action, it is not inoperative, and so far suspends the right to sue that it prevents its exercise without subjecting the plaintiff to an action, at the suit of the defendant, for a breach of the covenant or agreement. But there is a more important exception, (probably as old as the rule itself,) which is adverted to by Holt, C. J., and Dolben, J., in *Comberbach*, p. 124, where they are reported as saying “that the rule that a personal action once suspended is forever extinct, does not hold in all cases.” In the report the exception is not specifically mentioned; but in the report of the same case, in *Carthew*, p. 63, (under the name of *Ayloffe v. Scrimpsire*,) it is said that “it was agreed by all that a letter of license, containing the words following, namely, ‘that if the creditor sue, &c., within such a time, that his debt shall be forfeited,’ such license is pleadable in bar;” and this is plainly the exception to the rule that is adverted to by Holt, C. J., and Dolben, J., as reported in *Comberbach*. In the case of *Gibbons v. Vouillon*, 8 Com. B. Rep. 483; s. c. 19 Law J. Rep. (N. S.) C. P. 74, this law was considered and acted on; and it appears from the authorities cited in that case that there have been decisions to the like effect from the 21 Hen. 7. It is said by the reporter in *Fowell v. Forrest*, 2 Wms. Saund. 47, that a defeasance is a conditional release; and clauses that the debt shall be forfeited, or that the deed may be pleaded in bar, if a suit be commenced before a certain time or a certain event, are of common occurrence, and, as the cases cited show, have due effect given to them. In all these cases the right of action is effectually suspended for the time, or until the condition is performed; and, after the expiration

of the time, the action may be maintained, if the plaintiff, by bringing another action before the time, have not forfeited his debt under the provisions of the defeasance, or have not been barred in a former action.

There are, however, some modern cases, which have sometimes been considered as infringing on the rule, that an agreement not to sue for a limited time, without such clause of conditional release or forfeiture, is no answer to an action for a cause accrued after the agreement, but only a ground for a cross action, and giving to such an agreement the effect of a bar to an action brought before the expiration of the time. Of these, one of the principal is *Stracey v. The Bank of England*, where the language of the court, in giving judgment, if looked at without reference to the facts of the case, may seem to give countenance to the notion that an agreement not to sue during a limited time, without any clause of conditional release or forfeiture, is a bar to an action brought during the limited time; but if the facts of that case be adverted to, the language of the judgment will appear not to have such meaning. It was an action on the case by the plaintiff against the Bank of England, for not transferring some stock of his, standing in the books, to one Alder, to whom the plaintiff had sold it, and had called on the defendants to transfer it to him. The special verdict showed a binding agreement, between the plaintiff and the defendants, that the plaintiff should not call on the defendants to transfer the stock until the plaintiff had proved, or endeavored to prove, a debt against the estate of certain bankrupts. After this agreement, and before proof, or attempt to prove the debt, the plaintiff called on the bank to transfer to Alder, and it was for not complying with that demand that the action was brought. The court were of opinion, that, after the agreement, the plaintiff had no right to call on the bank to transfer before proving, or attempting to prove the debt; and, consequently, that the defendants, in refusing to transfer, on the occasion complained of, had done no wrong. It is clear that the right of action declared on had never accrued, and that no action for the refusal complained of in the declaration could be at any time maintained, the duty, of which that refusal was complained of as a breach, not existing at the time of the refusal. The language of the court, in giving judgment, is, "The agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time. It is urged, as an agreement by which the plaintiffs have, for a good consideration, restrained themselves from suing, not perpetually, but only till they shall have first done a particular act." If this be understood as meaning, that the agreement is not set up as a perpetual bar to any action that the plaintiffs may, at any time, bring respecting any refusal to transfer, but only to an action for a refusal after the agreement, and before proof, or attempt to prove, which action is barred by showing that the right to it does not exist; and if the "restraint from suing, not perpetually, but only until they shall have first done a particular act," be understood as meaning a restraint from calling for a transfer, and suing for a refusal to transfer, the reasons given for the judgment will

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be applicable to the case, and will conflict with no rule of law, which they would, if understood as affirming that an action may be barred by a mere agreement or covenant not to sue for a limited time. The expressions in question seem, indeed, to have been used by the court only for the purpose of showing that the plaintiffs, though defeated in that action, would not lose their right to the stock, but might claim a transfer after performing what they had agreed to do before claiming it. The judgment of the Exchequer Chamber, in *Ford v. Beech*, and other cases in which a suspension of the remedy has been spoken of, may, it is conceived, be explained in a like manner, so as to show them to be not inconsistent with the older decisions. The cases of covenants not to sue for a limited time, with a proviso for forfeiture, if an action be brought within the time, are an exception or qualification of the rule that a covenant not to sue for a limited time is no bar, as well as to the rule as to the suspension of rights of action. In such cases the right to sue is effectually suspended for a limited time, and for such time only, if no action be brought before the expiration of the time; and the covenant not to sue for a limited time, does operate as a bar, by force of the condition, if the action be brought within the limited time. It would, indeed, be anomalous, and without precedent, if it were held, that after a cause of action had accrued, and an action upon it had been barred by force of a release or defeasance conditional on its being sued upon before a limited time, another action could be maintained, for the same cause, after the time. But there is no such decision, and the contrary was determined by this court in a late case of *Overton v. Harvey*, 9 Com. B. Rep. 324; s. c. 19 Law J. Rep. (N. S.) C. P. 256, and is assumed in numerous books, in which it is given as a reason why a mere covenant not to sue for a given time is no bar; that, if it were, the debt would be gone forever, contrary to the intent of the parties.

Now, the cases in which a bill given on account of a debt has been said to suspend the right of action, and been held to be a bar to an action brought before the bill had turned out to be unproductive, are entirely in conformity with the cases establishing the exceptions above referred to. The true principle of the cases on bills seems to be that pointed out by Pollock, C. B., in *Griffiths v. Owen*, 13 Mee. & W. 58; s. c. 13 Law J. Rep. (N. S.) Exch. 345. "In the case of a money demand, if the creditor accepts a promissory note, or an order for the payment of money, on account of the debt, that is a sort of qualified or conditional payment, and may be so pleaded;" and by Alderson, B., in *James v. Williams*, 13 Mee. & W. 828; s. c. 14 Law J. Rep. (N. S.) Exch. 220. "When bills of exchange are stated to have been delivered for, and on account of a promissory note, or any other sum in the declaration mentioned, then it is to be taken as a conditional payment." If an agreement were expressly made that the bill should operate as payment, unless defeated by dishonor, &c., there is no reason why a suit, brought while the payment remained undefeated, should not be barred by such agreement: and the cases in which a bill given on account of the debt has been held to operate as such payment, are to be supported by considering that such an agreement

is to be implied by law from giving and receiving such security on account of a debt on simple contract; and the cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an agreement that the bill shall operate as a conditional payment does not arise, when, if it did, the plaintiff would be deprived of a better remedy than an action on a bill; as in *Davis v. Gyde*, 2 Ad. & E. 623; s. c. 4 Law J. Rep. (N. S.) K. B. 84, in which, the debt being for rent, the plaintiff would part with a remedy by distress; and, as in *Worthington v. Wigley*, 3 Bing. N. C. 454; s. c. 5 Dowl. P. C. 504, where the demand being on a bond, the plaintiff might, in certain events, have recourse to other funds than he could in an action on a simple contract. If a bill given by the defendant himself, on account of the debt, operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger, for and on account of the debt, should not operate as a conditional payment by the stranger; and, if it have that operation, the plea in the present case will have the same effect as if it had alleged that the money was paid by William Bush, for, and on account of the debt. But if a stranger pay money, in payment, absolute or conditional, of the debt of another, and the causes of action in respect of it, it must be a payment on behalf of that other, against whom alone the causes of action arise; and, if adopted by him, will operate as payment by himself. See Co. Lit. 106, b. "If a stranger, in the name of the mortgagor, or his heir (without his consent or privity) tendereth money, and the mortgagor accepteth it, this is a good satisfaction." See also the case of 36 Hen. 6, reported in Fitz. Abr. "Barre," 166, "If a stranger does trespass to me, and one of his relations, or any other, give any thing to me for the same trespass, to which I agree, the stranger shall have advantage of that, to bar me; for if I be satisfied, it is not reason that I be again satisfied. *Quod tota Curia concessit.*" In the late case of *Jones v. Broadhurst*, in this court, the question of satisfaction by a stranger was argued and considered, but not decided, not being necessary to the determination of the case; but it is observed by the court, in giving judgment, that the decision in the 36 Hen. 6, reported in Fitzherbert, is consistent with reason and justice. It appears to us, therefore, that the bill given by Mr. Bush, on account of the causes of action of the plaintiff against the defendant, must be taken to be a conditional payment on behalf of the defendant; that the condition to defeat it not having happened, it operates as an absolute payment; that it might be adopted, and has been adopted, by the defendant, who relies on it in his plea, and, consequently, that it bars the action.

Judgment for the defendant.

 Beeson v. Burton.

 BEESON, appellant; BURTON, respondent.¹

November 17, 1852.

Parliament — County Vote — Freehold — Allottee of Land — Uncertain Interest — 8 & 9 Vict. c. 6.

The 8 & 9 Vict. c. 6, an Allotment Act, empowers deputies appointed under its provisions to make small allotments of land to resident freemen of L., to be held by them so long as they shall be willing to hold the same, and pay the rent, and conform to certain regulations. All the land is vested in the deputies as trustees; and they have the power to sell with the concurrence of a majority of a meeting of freemen occupiers:—

Held, that the allottees have freehold estates which entitle them to vote for members of parliament, as their estate may continue for life, and is not determinable on the mere will of the grantors.

THE following case was stated for the opinion of this court.

CASE. At a court, held before the barrister appointed to revise the list of voters for the southern division of the county of Leicester, the name of John Burton, and the names of twenty-eight others, claiming under exactly similar circumstances, appeared on the list of persons claiming to be entitled to vote in the election of any knight of the shire for that division of the county, and were all duly objected to by the appellant. • The said J. Burton appeared on the list of claimants as follows:—

Burton, John	3, Haymarket	Freehold interest in building and land	On record, T. Freemen's Common.
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J. Burton is a resident freeman of the borough of Leicester, and possessed of an allotment of land under the provisions of a private act of parliament, passed in the 8 & 9 Vict. c. 6, entitled "An act to repeal so much of an act for enclosing lands in or near the borough of Leicester, as relates to the regulation and management of the freemen's allotments, and to make other provisions in lieu thereof." By this act, which is annexed to and forms part of the case, the resident freemen are empowered to elect from their own body a certain number of deputies to act for them in the regulation and general management of the freemen's allotments. The 8th section empowers the deputies to take possession of the lands comprised in the first schedule of the act (of which lands the allotment of the present claimant forms a part) and break up the whole or such parts thereof, as to them shall seem expedient, and apportion and divide the same when so broken up into small allotments, not exceeding five hundred yards each among the resident freemen desiring to become occu-

¹ 22 Law J. Rep. (N. S.) C. P. 33. Appeal from Revising Barrister's Court.

piers thereof at an annual rent, to be fixed at the discretion of the deputies, but not exceeding $\frac{1}{4}d.$ for every square yard, nor less than 1s. for every hundred yards, the allotments to be held respectively by each resident freeman desiring to become the occupier, obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations, to be made from time to time by the said deputies. By the 15th section, all the lands comprised in the two schedules of the act, are vested absolutely in the deputies for the time being, in trust for the resident freemen. By the 17th section, the deputies have power to dispose by absolute sale of all or any part of the allotments comprised in the first schedule of the act, freed and discharged from all right, claim, and interest of the resident freemen; but by the 22d section, no sale is to be effected under the powers of the act, without the consent of the major part of the freemen assembled at a public meeting, to be convened and conducted in the manner directed by this section. By the 32d section, in case any freeman shall be in arrear of rent for his allotment, for the space of fourteen days, or shall not conform to the provisions of the act, or the orders, rules and regulations to be made by the deputies, the said deputies may reënter such allotment, and by force evict and dispossess such freeman. The claimant has erected buildings on the land allotted to him, which land and buildings are above the value of 40s. a year, above all charges. It was contended, on the part of the appellant, that the claimant had no freehold interest in his allotment; but the revising barrister decided that he had, and inserted the claimant's name accordingly on the list of voters for the parish of St. Mary, Leicester.

Nov. 1. *Cox*, for the appellant. The respondent had no freehold interest in the land in respect of which he claimed. The question turns upon the Allotment Act, 8 & 9 Vict. c. 6, by the 8th section of which the deputies appointed under the act, are empowered to break up certain lands, and to parcel them out in small allotments to freemen and freemen's widows desiring to become occupiers of them. By that section, the allotments are to be held as long as the occupiers are willing to hold, and pay the rent and conform to the rules made by the deputies. The right of the allottees to hold is modified by the powers of the deputies, who are empowered to make regulations, and are also empowered under sections 17 and 22 of the act to sell or exchange the allotments, with the consent of a majority of the freemen and freemen's widows. The case comes distinctly within the authority of *Davis v. Waddington*, 7 Man. & G. 37; s. c. 14 Law J. Rep. (N. S.) C. P. 45, where it was held that inmates of almshouses appointed and removed by trustees appointed under a charter of incorporation, *toties quoties sibi conveniens videbitur*, had no freehold entitling them to vote.

[MAULE, J. The rule laid down in Co. Litt. 42, a. is, that a man who has an estate granted to him for an uncertain time, has an estate for life determinable.]

Beeson v. Burton.

Hayes, for the respondent. The allottees have an estate of freehold. The 11th section of the Allotment Act provides for the reletting of the allotments on the death of occupiers, and evidently contemplates death as the ordinary determination of the occupier's estate. The case of *Davis v. Waddington*, proceeded on the ground that when another party has an arbitrary power of putting an end to the occupier's estate, he has no freehold.

[MAULE, J. The parties in that case had a right to remain in possession as long as the trustees permitted them.]

In the note to *Davis v. Waddington*, there is a collection of authorities tending to establish the proposition laid down in the note to *Wynn v. Wynn*, 2 Man. & G. 19; s. c. 10 Law J. Rep. (N. S.) C. P. 23, "that any interest in land of uncertain duration (though not expressed to be for life), determinable by matter subsequent, which (per Brooke, J., M. 14, H. 8, fol. 13 a.) is the substance of human agency, (as where it is determinable at the will of a stranger¹) constitutes a freehold for life. The intention of the note to *Davis v. Waddington* seems to be to show that the court rather strained the law. It cites this passage from Preston Estates, 405, 7 Man. & G. 46, "A limitation for such an indefinite period passes an estate for life, because the estate may continue to the end of that period, and is certainly circumscribed by it." The present case is within the principle of *Simpson v. Wilkinson*, 7 Man. & G. 50; s. c. 14 Law J. Rep. (N. S.) C. P. 49, in which it was held that bedesmen of a hospital appointed for life were freeholders. At all events, this is an estate which may continue for life. It is only an uncertain event which can put an end to it. The duration of the estate does not depend only upon the will of the party granting it, but partly upon the will of the recipient by the representation of the majority of the freemen. In *Davis v. Waddington*, the estate depended upon the will of the grantor only. The contingencies in this case which could determine the occupier's estate were, first, a sale; and, secondly, consent to the sale by the majority of the freemen. The case, therefore, falls within the rule laid down in Co. Litt. 42 a, and the allottees were, therefore, freeholders, and as such entitled to vote.

[MAULE, J. The case of *Wynn v. Wynn* is quite in point, for there, as here, the estate was determinable at the will of a stranger]

Cox, in reply. The deputies, who were the appointors of the allotments, were the parties who had the power to defeat the estate of the occupiers. The present case is not substantially distinguishable from *Davis v. Waddington*.

JERVIS, C. J. It seems to me that the view taken by the revising barrister in this case was the correct one, and, therefore, that his decision must be affirmed. I think that the claimant had a freehold interest

¹ The words in the parenthesis are those of the annotator, and not of Brooke. Per JERVIS, C. J.

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which entitled him to vote. It was admitted by the counsel for the appellant that the possession of an estate of uncertain duration would be enough to give the possessor a vote as a freeholder; but it is said that here the estate is not of uncertain duration, because, within the authority of *Davis v. Waddington*, it was determinable by the trustees under the act. But, looking at the 8th section, I find that the allottees are to hold as long as they shall be willing, and it is admitted that there is nothing else in the act which would confer a freehold upon the allottees. But it is said that the words relied upon are so qualified by what follows, that no freehold estate is granted by them. It is then asked, if the estate be not one of freehold, what estate can it be? It is not one for years or at will. But it is said that it is a sort of parliamentary estate, something between an estate at will and a freehold. It would be inconvenient if we were to hold that it is such an estate as that, and we cannot hold otherwise than that it is a freehold. It is clear from *Davis v. Waddington*, that an estate at will would not have conferred a freehold. This estate, at all events, is not at the uncontrolled will of the grantor, but at the will of the deputies and the freemen (of whom the claimant is one), jointly. The estate of the allottee is therefore uncertain as to its duration, and is an estate for life under the rule in *Co. Litt.* 42 a., and the allottee was therefore entitled to vote.

MAULE, J. It appears to me that the claimant was rightly held by the revising barrister to be entitled to vote. The question is, what estate he had in the land? It is a well-established rule that an estate for a man's life, ordinarily speaking, or an estate for life determinable on an event not in the power of the lord from whom the tenant holds, is a freehold. In this case the estate is determinable on the happening of certain events of a very special kind,—of the deputies choosing to sell the land, and of getting the concurrence of a majority of a meeting of allottees, occupiers for the time being. This is an event not depending upon the will of the lord alone. There cannot be that kind of arbitrary removal which takes away the freehold character of the estate. Here it is as much out of the power of the lord to determine the estate as if there were no necessity for his concurrence at all. The circumstance of his concurrence being necessary, does not make the concurrence of the others less necessary. The estate cannot be defeated at his arbitrary will, and such an estate as that is clearly one of freehold. I think *Davis v. Waddington* was perfectly well decided. There the person enjoying the property, and claiming the right to vote, was appointed by the trustees to be an inmate of the almshouses, and to continue in them so long as they should think fit to allow him to continue. It was clear that there was no freehold there. But in this case there is a freehold, and the revising barrister was quite right in his decision.

WILLIAMS, J. I am of the same opinion. I think that the estate of those who claim a right to vote in this case is an estate of freehold,

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because it is an uncertain interest, which may last for the life of the tenant, and is not subject to the mere will of the grantors.

Decision of the revising barrister affirmed.

FORD appellant; SMEDLEY, respondent.¹

November 10, 1852.

Parliament — Vote for Borough — Assessed Taxes when payable —
 43 Geo. 3, c. 99, s. 12 — 43 Geo. 3, c. 161, s. 23 — 48 Geo. 3, c. 141,
 s. 1 — 2 Will. 4, c. 45, s. 27 — 11 & 12 Vict. c. 90.

By 11 & 12 Vict. c. 90, no person is entitled to be registered as a voter, unless, on or before the 20th July, he shall have paid all assessed taxes which have become payable by him previous to the 5th of January preceding. By the 43 Geo. 3, c. 161, s. 23, the assessed taxes are payable, and are to be paid quarterly on the 20th of July, the 20th of September, the 20th of December, and the 20th of March. By the 48 Geo. 3, c. 141, s. 1, the collectors are directed to collect the assessed taxes, in equal moieties, within twenty-one days after the 10th of October and the 5th of April; but with a proviso, that nothing therein contained shall be construed to alter the time when the duties are made payable by the previous acts. The quarter's house-tax due from the appellant on the 20th of December was not demanded till the 11th of April following, and he did not pay it before the 20th of July:—

Held, that the quarter's assessed taxes, which, by the 43 Geo. 3, c. 161, s. 23, became payable on the 20th of December, are taxes which, in the language of the 11 & 12 Vict. c. 90, have become payable before the succeeding 5th of January, although no demand for payment has been previously made; and that therefore the appellant was not entitled to be placed on the register.

THE following case was stated for the opinion of this court, by the revising barrister for the city of Westminster:—

CASE. The appellant claimed in respect of certain property occupied by him in the parish of St. Clement Danes, to have his name inserted in the list of persons entitled to vote at the election of members to serve in parliament for the city of Westminster; his claim was free from all objections, except one, namely, that he had made a default in payment of assessed taxes. Under the Reform Act, the 2 Will. 4, c. 45, no person could be put upon the register unless he had paid on or before the 20th of July all assessed taxes which should have become payable from him, in respect of the premises, previously to the 6th of April then next preceding. By the 11 & 12 Vict. c. 90, the period of permissible arrear is enlarged, for, by that act, it is sufficient if the claimant hath paid on or before the 20th of July all assessed taxes which shall have become payable from him in respect of the premises previously to the 5th of January in the same year. Assessed

¹ 22 Law J Rep. (N. S.) C. P. 35; 16 Jur. 1159. Appeal from Revising Barrister's Court.

taxes appeared to me payable quarterly, on the 20th of June, the 20th of September, the 20th of December, and the 20th of March in each year. The instructions to the collectors represent the assessed taxes as payable quarterly, and require them to be collected and recovered forthwith whenever there is danger that a tax may be lost; a copy of their instructions was laid before me, and it appeared by them and from other evidence that, to save expense and to promote convenience, assessed taxes, although payable quarterly, were in general collected only half-yearly, by equal moieties, at Michaelmas and at Lady-day. It was proved that the collector always received quarterly payments voluntarily tendered, and for such quarterly payments gave quarterly discharges. The appellant was returned a defaulter under the 12th section of the Registration Act, 6 Vict. c. 18, for not having paid, on or before the 20th of July, 1852, the quarterly house-tax of the 20th of December, 1851, and in point of fact it was proved that he did not pay the tax until the 30th of July, although the same was demanded of him on the 11th of April. I held that the quarterly house-tax of the 20th of December, 1851, was, under the 11th & 12 Vict. c. 90, payable from the appellant previously to the 5th of January last, and as he had allowed the 20th of July to expire without satisfying the demand, I rejected his claim. The appellant urged that, inasmuch as the quarterly house-tax of the 20th of December was not actually demanded previously to the 5th of January, it was therefore not payable previously to that day; but I did not assent to that proposition. The appellant urged also that it was enough for him to have paid his assessed taxes down to the 20th of September; but I held the contrary.

If the Court of Common Pleas shall be of opinion that, under the circumstances stated, it was not necessary for the appellant to have paid, on or before the 20th of July, the house-tax of the 20th of December last, he will in that event be entitled to have his name inserted in the said list of voters for the city of Westminster. Several appeals depend upon the judgment which the Court of Common Pleas may deliver upon this case; these appeals ought, therefore, to be consolidated.

Kinglake, Serg., (*Keane* with him) for the appellant. First, the tax was not payable quarterly, but by half-yearly instalments, and, therefore, in the present case was not due until after the fifth of January. By the 43 Geo. 3, c. 161, s. 23, the assessed taxes are made payable by quarterly instalments; but the 3d rule of the 48 Geo. 3, c. 141, says, that they shall be collected by moieties within twenty-one days after the 10th of October and the 5th of April in each year. Upon these two statutes, it is contended that for all common purposes the taxes are to be collected half-yearly, and that the proviso contained in the latter act, giving power to the collector to demand, receive, or levy the taxes under the old statutes, was only intended to be acted upon in cases of emergency. This construction is consistent with the general practice, which is to demand two quarters' assessed taxes in September and March. Applying this construction

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to the words of the Reform Act, 2 Will. 4, c. 45, s. 27, "all taxes which shall have become payable," mean taxes which are to be paid half-yearly, and not quarterly. The Irish Act, 2 & 3 Will. 4, c. 88, s. 7, affords a further argument in favor of this view. Secondly, supposing the tax to have been payable quarterly, yet for the purpose of disfranchisement it was not payable until demanded; here no demand was made before the 5th of January. The 43 Geo. 3, c. 99, s. 12, imperatively requires demand within ten days after the taxes are payable, and the 33d section gives a power to distrain in case of refusal.

[JERVIS, C. J. That is, they cannot collect forcibly until after demand.]

The Reform Act abolishes scot and lot voters, and imposes upon the substituted class the condition of payment of taxes; but in the case of scot and lot payers demand was necessary before disfranchisement of the voters. *Cullen v. Morris*, 2 Stark. 577.

[JERVIS, C. J. No period was fixed for the payment of scot and lot.]

On one or other of these grounds, this claim should have been admitted.

Wordsworth, for the respondent, was not heard.

JERVIS, C. J. In my opinion the revising barrister put a right construction upon the statutes relating to the collection of taxes, and, therefore, properly rejected the vote. The real question is, whether this tax was payable on the 20th of December, or on the 20th of March, or only on demand. When you come to look at the acts of parliament, no difficulty arises whatever. The words themselves explain their meaning. By the first act, the 43 Geo. 3, c. 99, s. 12, the assessment was to be made yearly, and payment was to be demanded within ten days after the taxes became payable. The second act, the 43 Geo. 3, c. 161, s. 23, fixes specifically the days on which the tax is payable, and expressly says, that it shall be paid by quarterly instalments on the 20th of June, the 20th of September, the 20th of December, and the 20th of March; and then, to avoid the hardship of the collector pouncing upon the tax-payer and putting his powers in force without further notice, the statutes provide that a certain demand must be made, within a certain time after the debt becomes due, before levy or execution by seizing the goods. Then, by the 48 Geo. 3, c. 141, directions are given for collecting the taxes in moieties, namely, one moiety before the 10th of October, or within twenty-one days thereafter, and the other moiety before the 5th of April, or within twenty-one days thereafter; and in order to avoid any ambiguity, there is an express proviso that nothing therein contained shall be construed to "alter the times or proportions at which the said duties are payable," and it shall be lawful to demand, receive or levy the same according to the previous acts. It is said that there are expressions in the statute which represent the time of payment and levy as identical, that is, after the half year has expired. But the answer to that is, if

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you levy, you compel payment by compulsory means, and payment so enforced necessarily supposes a previous demand, because the act of parliament which gives the power to compel the payment by such means requires that previous to the levy there should be a demand. As to a previous demand being necessary, the answer to that follows immediately from what has been said. The tax is made payable quarterly by the statute, and is, therefore, payable without demand, although it cannot be enforced without such demand. The voter, therefore, has not paid his taxes in due time, and is not entitled to vote. Therefore, the revising barrister was right in rejecting the claim.

MAULE, J. I entirely agree with the lord chief justice. The question is, what are the taxes which have become due before the 5th of January. That must depend upon the statutes imposing the tax. Now, the statute expressly provides that the tax "shall be paid" and "payable quarterly." Then there are some provisions in the act with respect to calling upon the collector to collect them half-yearly, that is, not to let them go over the half year. But there is nothing to prevent him from collecting them sooner if he pleases, although such is not the general practice. This is the clear, simple, and plain sense of the words; and I doubt whether any thing but serious inconvenience, which I think there is not in this case, could justify us in saying that any thing else was meant. The words of the act are so plain that it is impossible to put any other meaning upon them without doing violence to the language. If the act of parliament says that 20s. are to be paid, you cannot call it 25s. or 15s. without doing violence to the language of the act itself. If one act of parliament says that the taxes shall be payable in December, and another act says that all taxes payable before the 5th of January shall be paid, you must understand those simple words in the same sense in both acts. The consequence is, that the voter has not complied with the condition which the act imposes on the right to vote, and, therefore, he is not entitled to exercise it.

TALFOURD, J. I am entirely of the same opinion. The words are quite clear, and no inconvenience can arise which could justify our putting any other construction on them.

Decision affirmed, with costs.

 Collins v. Thomas.

COLLINS, appellant; THOMAS, Town Clerk of the Borough of Tewksbury, respondent.¹

November 12, 1852.

Parliament — Borough Franchise — Meaning of the word "therewith" — 2 Will. 4, c. 45, s. 27.

The appellant claimed to vote in respect of the occupation of premises described as a "house and garden," and held under the same landlord, at one entire rent. The house alone would not let for 10*l.*, and the garden was separated from it by waste land and a row of buildings: —

Held, that the word "therewith" in the 27th section of the Reform Act had reference to time and not to locality, and that, therefore, the circumstance of the garden being separate from the house did not invalidate the qualification, as the house alone would not have let for 10*l.*

CASE. At the court held before the barrister appointed to revise the lists of voters for the borough of Tewksbury, for the revision of the lists of voters for the said borough, on the 12th of October, 1852, John Collins objected to the name of James Beesley being retained on the list of persons entitled to vote for the said borough, in respect of the occupation of premises described on the list as "house and garden," on the ground that the garden was separate and apart from the house.

The party objected to occupies a house in Chance-street, within the borough of Tewksbury. He is also a tenant, under the same landlord, of garden ground (also within the borough of Tewksbury), which is not immediately adjoining the house, but the house and the piece of garden ground were both taken of the same landlord, at the same time, and at one entire rent. The garden ground is at the back of the voter's house, and not more than forty yards distant from it in a direct line; but between the house and the garden ground there is some waste land and a row of buildings, and to get to the garden ground the voter must go out of his front door into Chance-street, and along the public road for not more than sixty yards, then turn to the right and go along another public road for not more than forty yards, to the gate leading into the garden ground. The garden ground is allotted amongst the tenants of the houses in Chance-street, each tenant having a separate allotment, which is included in and forms part of his tenancy. The house and the piece of garden ground let with it are together worth more than 10*l.* per annum, but the house alone is not of the annual value of 10*l.* The revising barrister decided that James Beesley occupied a house and land of sufficient value to entitle him to have his name retained on the list of voters for the said borough, within the meaning of the statute, 2 Will. 4,

¹ 22 Law J. Rep. (N. S.) C. P. 38; 17 Jur. 25. Appeal from Revising Barrister's Court.

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c. 45, s. 27, and retained his name accordingly. If the court should be of a contrary opinion, the name of the said James Beesley is to be expunged from the said list of voters, and also the names of other voters, who were also objected to. The appeals against the decision in respect of their names were consolidated.

Kerr, for the appellant. The question is, what is the meaning of the expression "therewith" in the 27th section of the Reform Act? Has it reference to time or locality? In *Capell v. The Overseers of Aston*, 8 Com. B. Rep. 1; s. c. 19 Law J. Rep. (N. S.) C. P. 28, Wilde, C. J., threw out a suggestion that it meant "local contiguity"; and this, it is submitted, is the right construction, being the only one which satisfies the rule that every word should have a meaning and value if possible. If "therewith" is held to mean contemporaneously, it is a surplussage, for the words "occupied by him as tenant under the same landlord" imply that; and this consequence will further follow, that although the tenant, if he were to cover the land with a building, cannot join the building and the house so as to gain a vote. *Powell v. Price*, 4 Ibid. 105; s. c. 16 Law J. Rep. (N. S.) C. P. 139, yet he can join the land if there be no building.

[*MAULE, J.* The words of the act are very plain; the voter must occupy the house and land at the same time within the borough, under the same landlord.]

Pashley, for the respondent, was not heard.

*Per Curiam.*¹

Decision affirmed, with costs.

THE BRITISH EMPIRE MUTUAL LIFE ASSURANCE COMPANY v. BROWNE.²

November 8, 1852.

Company—Unilateral Contract—Execution—Right to sue—7 & 8 Vict. c. 110, s. 44.

By a deed made between L. and his wife of the first part; the defendant of the second; the plaintiffs, a joint-stock company, of the third, and the trustees of the company of the fourth, in consideration of 200*l.* advanced to L. by the company on the execution, L. and the defendant covenanted to pay an annuity to the plaintiffs, and that L. should keep on foot a policy on his own life, and one upon his wife's. L. and his wife further granted to the trustees their interest in certain freehold property, upon trust to pay thereout, by sale or otherwise, the arrears of the annuity, and pay over the surplus moneys received to the parties entitled thereto. In an action of covenant by the company against the defendant for the non-payment of the annuity, and for not keeping on foot the policies, the defendant, after setting out the deed on oyer, pleaded that it was a contract made on behalf of a com-

¹ *JERVIS, C. J., MAULE, J. and TALFOURD, J.*

² 22 Law J. Rep. (N. S.) C. P. 51; 16 Jur. 1158.

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pletely registered joint-stock company, under the 7 & 8 Vict. c. 110, s. 44, and that it was void because it was not executed with the formalities thereby required:—

Held, that the plea was bad, the contract not being one made on behalf of the company, and being a unilateral one, on which the covenantee might sue without executing it.

COVENANT on an indenture made between Loder and his wife of one part, the defendant of the second part, the plaintiffs, a joint-stock company, of the third, and the trustees of the company of the fourth part, for non-payment of an annuity, and for not keeping on foot a policy of insurance on Loder's life, and another on the life of his wife.

Plea—setting out the indenture on oyer as follows:—“This indenture, made the 5th of February, 1851, between W. Loder and E. D., his wife, of the first part; W. Browne, the defendant, of the second part; the British Empire Mutual Life Assurance Company of the third part, and R. Cartwright, F. Cuthbertson, J. Gover and W. Groser, the general trustees of the said company,—and which said trustees and the survivors and survivor of them, his heirs, &c., so far as regards the real estate hereinafter mentioned, and the survivors and survivor of them, &c., with respect to the personal estate hereinafter mentioned, are designated by and included in the expression, where the same is hereinafter used, of ‘the said trustees,’—of the fourth part. Whereas the said W. Loder hath requested the said company to advance to him the sum of 200*l.*, which they have agreed to do on his granting to them in consideration thereof an annuity of 82*l.* 5*s.* 6*d.* for the term of three years, if the several persons hereinafter in that behalf named, or the survivor of them, shall so long live, to be payable and secured as hereinafter mentioned. Now, this indenture witnesseth that in consideration of the sum of 200*l.* sterling to the said W. Loder, upon the execution hereof paid by the said company, the receipt whereof is hereby acknowledged, they, the said W. Loder and W. Browne, do, and each of them doth hereby for himself and themselves and their respective heirs, &c., jointly and severally covenant and agree with the said company, their successors and assigns, that the said W. Loder, his heirs, &c., shall and will pay unto the said company, their successors or assigns, an annuity of 82*l.* 5*s.* 6*d.* sterling, during the term of three years, to commence from the 1st of February inst., if T. Smith, J. Martin, H. Gover and F. I. Timms, or the survivor of them, shall so long live, and to be paid on the first day of each year of the said term, without any deduction thereout. The first payment thereof to be made on the 1st of February next, and the last payment thereof on the 1st of February, 1854, if the said term should so long continue. That the said W. Loder, his heirs, &c., shall and will, until the whole of the said annuity, and all arrears thereof, and all costs and charges incident thereto, shall be fully paid and satisfied, keep on foot the two several policies of assurance which the said W. Loder has effected with the said company, on the lives of himself and of his said wife, for 200*l.* each, dated the 4th of February, and numbered respectively 3,756 and 3,757, which he has this day deposited with the said company for better securing the due payment thereon, then that the said trustees may pay the same, and that he,

the said W. Loder, his heirs, &c., shall upon demand repay to them the amount of the moneys so paid. That for the considerations aforesaid, and for the better securing the said annuity, they, the said W. Loder and E. D. his wife, so far as regards their estate and interest, or the estate and interest of the said W. Loder, in right of his said wife expectant upon and to take effect upon the decease of M. A. Maslin, the mother of the said E. D. Loder, do, and each of them doth, hereby grant, bargain, &c., the said trustees, all that their sixth part or share, and all other their share and interest of and in all that freehold messuage, &c., situate, lying, and being in the parish of Winkfield, in the county of Berks, and now in the occupation of the said M. A. Maslin, or her tenants, and all ways and appurtenances thereto belonging, and all the estate, right, title, and interest of them, the said W. Loder and of his said wife, or of either of them, to the same, to have and to hold the said premises unto the said trustees forever, subject as hereinafter mentioned. That, for the consideration aforesaid, they, the said W. Loder and E. D. his wife, so far as regards their estate and interest or the estate and interest of the said W. Loder, in right of his said wife, expectant as aforesaid, do, and each of them doth bargain, sell, and assign unto the said trustees all that their sixth part or share, and all other their share and interest of and in all that leasehold, messuage, or tenement and premises situate and being in Wardour-street, Soho, in the said county of Middlesex, and now in the occupation of, &c.; and also all other the share and interest whatsoever, present and future, of them, of and in all moneys, estate, and effects whatsoever which they are, or either of them is in any way entitled to, under or by virtue of the last will and testament of C. Maslin, deceased, the father of the said E. D. Loder, dated on or about the 19th day of November, 1839, and all the right, title, &c., whatsoever of them, the said W. Loder and E. D. his wife, or either of them, to the said hereby assigned premises, to have and to hold the said leasehold premises unto the said trustees for all the residue of their term and interest therein, save the last day thereof, and all other the said personal estate, unto the said trustees forever. And it is hereby agreed and declared, that the said trustees shall stand possessed of and interested in the said premises, upon trust for securing the due payment of the said annuity, and for that purpose upon trust that if the said annuity, or any part thereof, shall at any time be in arrear for seven days after the days hereinbefore appointed for the payment thereof, by and out of the said hereby assigned premises, or by mortgage or absolute sale thereof by public auction or private contract, without any previous notice, or by all or any of the said ways or means, at their discretion, to levy and raise such sum and sums of money as shall be necessary for paying and satisfying the said annuity and all costs and charges which the said company or the said trustees shall or may sustain, expend, or be put unto by reason of the non-payment thereof or otherwise in execution of the trusts thereof, and do and shall pay and apply the money so to be levied and raised in and towards payment and satisfaction of the said arrears and the accruing payments of the said annuity, and all costs and charges,

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and pay the residue (if any) unto the parties entitled to the same. That all contracts, mortgages, &c., and things which shall be entered into, made and executed by the said trustees, of or concerning the said hereby assured premises, or any part thereof, shall, to all intents and purposes, be as valid and effectual in law as the same would have been if the said W. Loder and E. D. his wife, their or either of their heirs, &c., had actually joined in and executed the same. That the said trustees shall not be answerable for any loss which may happen through their own wilful default; and that the receipt or receipts of them, the said trustees, for any moneys payable to them by virtue hereof, shall sufficiently discharge the persons paying the same, and who shall not be liable to see to the application of such moneys, nor be answerable or accountable for the loss or misapplication thereof, nor be obliged to inquire or ascertain whether such mortgages or sales as shall have been made by the said trustees by virtue hereof shall have been necessary for all or any of the purposes herebefore mentioned. And for the better enabling the said trustees to have, receive, and take the hereby assigned premises, they, the said W. Loder and E. D. his wife, do and each of them doth hereby irrevocably nominate, constitute, and appoint the said trustees their, his, and her true and lawful attorneys and attorney, to ask, demand, sue for, and recover, receive, and take the payment, transfer, and assignment of the said hereby assigned premises, and every part and parcel thereof, and on receipt thereof to make, sign, and give such receipts, releases, and discharges in law for the same as shall be necessary, and in default thereof to commence and prosecute with effect all such actions, suits, and other proceedings at law and in equity for the recovery thereof as the said attorney shall be advised, and generally to do and perform all and every such further and other acts, &c., in the premises as he or they shall think fit. And the said W. Loder, for himself and his said wife, and their respective heirs, &c., doth hereby covenant and declare, to and with the said trustees, that they have, or one of them now hath in himself or herself full power and absolute authority to charge all and singular the said premises hereby charged with the payment of the said annuity, and convey and assure the said premises as aforesaid. That the said premises shall be holden and enjoyed without any hindrance, interruption, claim, or demand whatsoever from or by them, the said W. Loder and E. D. his wife, or either of them, or either of their heirs, &c., or any other person whomsoever, and that free and clear, &c., and discharged by them the said W. Loder and E. D. his wife, their or either of their heirs, &c., of, from and against all and all manner of former estates, titles, &c. That they the said W. Loder and E. D. his wife, their and each of their heirs, &c., and every other person lawfully and equitably claiming any estate, right, title, or interest whatsoever into or out of the said premises hereby charged or conveyed and assured, or any part thereof, shall and will at all times hereafter, upon every reasonable request of the said trustees, but until such mortgage or sale shall be made, at the costs and charges of the said W. Loder and E. D. his wife, or one of them, their or one of their heirs, &c., and after such

sale or mortgage, then at the costs and charges of the persons requiring the same, make, do, and execute all such further and other reasonable acts, deeds, matters, and things whatsoever, as may be necessary for the more effectually charging, granting, mortgaging, and assuring the said hereby assured premises unto the said trustees, or any mortgagee or purchaser thereof. That when and so soon as by the expiration or other sooner determination of the said term of three years, the annuity hereby granted shall cease to be payable, and all arrears thereof, and all other sum and sums of money due and payable to the said trustees shall have been fully paid and satisfied, then these presents, and every thing herein contained shall cease and be void, but subject and without prejudice to any act, deed, matter, or thing which shall in the meantime have been made and done by virtue hereof. In witness whereof," &c. The plea then alleged, that before and at the time of the making of the said supposed indenture, the plaintiffs were, and from thence hitherto have been, and still are a joint-stock company, completely registered under the act of parliament, 7 & 8 Vict. c. 110, entitled, "An Act for the Registration Incorporation, and Regulation of Joint-Stock Companies," and that the said supposed indenture and the covenant in the declaration mentioned was a contract entered into on behalf of the said joint-stock company so completely registered as aforesaid, and was not, nor is it, a contract for the purchase of any article the payment or consideration for which did not nor does not exceed the sum of 50*l.*, or for any service the period of which did not or does not exceed six months, and the consideration for which did not or does not exceed 50*l.*, and was not, nor is it, a bill of exchange or promissory note. That the said contract, indenture, and covenant was not, nor is it, signed by two of the directors of the said company, and sealed with the common seal thereof, or signed by any officer of the said company on its behalf, thereunto expressly authorized by any minute or resolution of the board of directors applying to the particular case; whereby, and by force of the statute in such case made, the said contract, indenture, and covenant was and is void and ineffectual, except as against the plaintiffs, being the company on whose behalf the same has been made. Verification.

Demurrer, stating for grounds, that the matters of defence therein pleaded, do not constitute any defence, for that they do not make the said indenture void and ineffectual against the plaintiffs; that the requisites therein alleged are not necessary for such an indenture; that the indenture is not a contract within the meaning of the enactment of the statute referred to in the said plea, &c.

Willes, for the demurrer. This plea is founded on the Joint-Stock Companies Act, 7 & 8 Vict. c. 110, s. 44,¹ which for the purpose of

¹ "That every such contract shall be in writing, and signed by two, at least, of the directors of the company, on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board

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regulating contracts entered into on behalf of joint-stock companies completely registered under the act (except contracts for the purchase of articles not exceeding 50*l.*, or for any service not exceeding the period of six months and the amount of 50*l.*) enacts, that every such contract shall be in writing, and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites, or any of them, any such contract shall be void and ineffectual, except as against the company on whose behalf the same shall have been made. The contract declared upon in this case, and set out in the deed, is not one which comes within the provisions of the statute, as it is an unilateral one, which does not bind the company to do any thing. But for the case of *Ridley v. The Plymouth, &c. Grinding and Baking Company*, 2 Exch. Rep. 711; s. c. 17 Law J. Rep. (N. S.) Exch. 252, there would have been no doubt about the matter. It was not necessary, in order to give the company the power to sue, that they should have executed the deed.

[MAULE, J. If execution was a condition precedent, then the plaintiffs should have shown it.

JERVIS, C. J. And as I understand the act, there could be no execution except in the form given by the statute.]

But execution is not a condition precedent, and unilateral contracts are not within the statute. Looking at all the cases together, it is clear that covenantees, who can sue, must sue, and that covenantees may sue although they have not executed, unless execution be a condition precedent. The case of a lease is the single exception. *Soprani v. Skurro*, Yelv. 18; *Pitman v. Woodbury*, 3 Exch. Rep. 4; *Rose v. Poulton*, 2 B. & Ad. 822; s. c. 1 Law J. Rep. (N. S.) K. B. 5.

Hugh Hill, contra. This contract is one which comes within the 44th section of the act, and is therefore void as against the company; and they cannot, therefore, sue upon it. The authority of the class

of directors applying to the particular case; and that in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (except as against the company on whose behalf the same shall have been made); and that every such contract for the purchase of any article, the consideration of which doth not exceed the sum of 50*l.*, or for any services, the period of which doth not exceed six months, and the consideration for which doth not exceed 50*l.*, entered into on behalf of any joint-stock company, completely registered under this act, may be entered into by any officer authorized by a general by-law in that behalf; and that every such contract, whether under seal or not, shall immediately after the same shall have been entered into, be reported to the secretary or other appointed officer of the company on whose behalf the same shall have been entered into, who shall enter the same into proper books to be kept for that purpose; and, that if any such contract be not so reported and entered, then the officer by whose default such contract shall not be so reported or entered, shall be liable to repay to the company on whose behalf such contract may be made the amount of the consideration agreed to be paid by, or on behalf of such company in respect of such contract."

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of cases which are cited in *Wetherell v. Langston*, 1 Exch. Rep. 634; s. c. 17 Law J. Rep. (N. S.) Exch. 338, and which show that a covenantee may, and must, sue, though no covenant has been entered into by him, is admitted; and it is also admitted that under the Statute of Frauds, the signature of the party sought to be charged is sufficient. But the contract here is clearly one made on behalf of the company; and it is, therefore, necessary to show that the requisites of the Joint-Stock Companies Act have been complied with. Here the trustees of the company are empowered to sell certain property to pay the arrears of the annuity, and are directed to pay over the surplus to the party entitled. Therefore, although there is no positive act to be done which would form a ground of action against the company, still the trustees have certain duties to perform, which shows that the contract was one made on behalf of the company. There are exceptions made in this act with respect to certain contracts, and all cases not coming within those exceptions must be taken to be subject to the general provisions.

[MAULE, J. Was execution by this company necessary to give effect to the terms of the deed?]

Either execution or assent was necessary; and the deed, having been entered into on behalf of the company, and not having been executed in the manner directed by the act, is void under the 44th section of the act.

Willes, in reply.

JERVIS, C. J. I am of opinion that the plaintiffs are entitled to judgment. It is admitted, on the part of the defendant, that the statute applies only to cases of contracts entered into on behalf of the company, but it is contended that a more general application should be given to those words, because they are followed by an exception, and that every case not within the exception must come within the general rule. Now, the section of the act in question says that contracts shall be executed in a particular form, besides having the other legal requisites, and that, if they are not so executed, they shall be void, except as against the company. Is this a contract entered into on behalf of the company? It appears to me that it is not. On the deed set out, the question is, whether, in effect, the contract is on behalf of the company. It is contended that it is, because there is a covenant on the part of the trustees of the company to do certain things. I apprehend that is not the true meaning of the deed. The meaning is, that a sum of money is to be advanced, and an annuity is to be granted for the repayment, and there is a condition that certain property is to be sold, to pay the arrears of the annuity. That is not a covenant on the part of the company, but a condition of the grant of money. In effect, it is an engagement by the defendant and others to pay a sum of money; and it is equally binding whether the company executed the deed or not. In every case in which a company makes a contract to do something in consideration of which something else is to be done, then the contract is to be made in the

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manner pointed out by the act, in addition to the usual formalities. If it be not so made, the company is to be bound, but not the other party. That applies only to the performance of conditions by the company. But, in the present case, the contract being unilateral, and not made on behalf of the company, the statute does not apply.

MAULE, J. I agree with the Lord Chief Justice. Perhaps the object of the section is not very clear; but the words are clear enough. We must consider whether, apart from the act, this be a contract on behalf of the company. It is a covenant to pay certain moneys to certain covenantees. The deed having been executed, it became competent to them, without doing any act, to sue on the covenant. That is enough to show that the contract was not one made on behalf of the company. So far I have considered the case simply with respect to the general effect of the deed. With respect to its particular form, there is no doubt at all that, in whatever words the meaning of parties may be embodied, the meaning being the same, the words make no difference.

TALFOURD, J. I am of the same opinion. The only question is, whether, within the meaning of the act, the contract was made on behalf of the company, that is, whether it was a contract by which the managers of the company professed to bind it.

Judgment for the plaintiffs.

WINCH v. WINCH.¹

January 20, 1852.

County Court — Jurisdiction — Devastavit.

In an action in the county court to recover a legacy, under the 9 & 10 Vict. c. 95, s. 65, as extended by the 13 & 14 Vict. c. 61, s. 1, the judge has jurisdiction to try a question of *devastavit*.

THIS was an appeal from the decision of the judge of the County Court of Kent, upon the following case:—“This was an action to recover a legacy of 50*l.*, the plaintiff having, by his particulars, abandoned any excess on account of interest. Charles Winch, the father of the plaintiff, died on the 7th January, 1850, having by his will, dated the 13th September, 1849, devised and bequeathed certain real estate, and all his residuary personal estate, to Mary Ratcliffe and the

¹ 17 Jur. 88.

defendant, Amy Winch, upon trust, to convert the same into money, and therewith to pay his debts and funeral and testamentary expenses, and in the next place to pay the following legacies, namely, to the said Amy Winch, 50*l.*; to each of his sons, Charles Winch and John Winch, 50*l.*, and to his son James, 20*l.*; and he directed that such legacies should be retained by and paid to his said daughter and sons respectively, as soon as his trustees should have funds in hand sufficient for the purpose; and he directed his trustees to pay the residue of the said trust funds and moneys in manner in his will mentioned. The will then contained the following words:—‘Whereas I have lent my son Frederick Winch, or otherwise paid or advanced, for his use and benefit, several sums of money to a very large amount, the whole of which I have forgiven, with the exception of the sum of 600*l.*; now I do hereby will and direct that the trustees and executors of this my will, shall allow him, my said son Frederick Winch, the period of six years to pay the same, without interest; provided he, my said son Frederick Winch, shall liquidate such debt by instalments of not less than 50*l.* in each of the first five years of such period of six years, the first instalment to be paid at the expiration of twelve calendar months from the day of my decease;’ and the testator appointed the said Mary Ratcliffe and Amy Winch, executrices, and he empowered them, ‘notwithstanding any thing therein contained which might appear to be construed to the contrary, to compound or allow time for the payment of any debt or debts due to his estate, whether by strictly legal evidence or not, and to settle all accounts between him and any person or persons, on such terms as they, his said executrices, should, in their discretion, think expedient, and to refer any matters in difference relating to his affairs to arbitration.’ Mary Ratcliffe renounced, and the will was proved by Amy Winch alone, on the 5th February, 1850. On the hearing of this cause, assets were admitted to have been received by the defendant, to the amount of 2,638*l.* It was also admitted that she had paid the funeral and testamentary expenses and debts of the testator, to the amount of 2,735*l.* It was also admitted that no money had been paid by Frederick Winch to the defendant in respect of his debts, but that she had in the month of January, 1851, commenced an action of debt against him in the Court of Exchequer of Pleas, and obtained final judgment, in an undefended action, for 681*l.* 17*s.* 10*d.*, besides 21*l.* 12*s.* 7*d.* for interest. The judgment was obtained on the 26th February, 1851, but the defendant did not take any further proceedings under the judgment, until the 25th January, 1852, when a *fi. fa.* was issued, and the stock in trade and effects of Frederick Winch (who was a trader at Margate), were seized. The execution was, however, defeated by the subsequent bankruptcy of Frederick Winch. The plaintiff, under these circumstances, sought to charge the defendant with assets, alleging that she, the defendant, was liable to the payment of the *devastavit*. The court, however, doubting its jurisdiction, gave judgment for the defendant; against which the plaintiff appeals. The question for the opinion of this court is, whether, under the 65th section of the 9 & 10 Vict. c. 95, as extended by the 13

& 14 Vict. c. 61, the judge of the county court has jurisdiction to charge the defendant, under the above circumstances, with the payment of the legacy."

Byles, Sergt., for the appellant. The plaintiff contended, before the county court judge, that the defendant had been guilty of a *devastavit*; but the judge doubted whether he had jurisdiction to try a question of *devastavit*, and therefore gave judgment for the defendant. In this the judge was wrong. The 9 & 10 Vict. c. 95, s. 65, enacts that "the jurisdiction of the county court under this act shall extend to the recovery of any demand not exceeding 20*l*., which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will;" and the 13 & 14 Vict. c. 61, s. 1, extends the jurisdiction of the county court from 20*l*. to 50*l*. The case of *Pears v. Williams*, 6 Exch. 833; s. c. 6 Eng. Rep. 445, decides, in fact, the present case, for it was there held that a residuary bequest, although payable through the intervention of a trustee, is a legacy within the 9 & 10 Vict. c. 95, s. 65, and is consequently, when not exceeding 50*l*., within the more extended jurisdiction given by the 13 & 14 Vict. c. 61, s. 1. The jurisdiction to try the right to a distributive share under an intestacy, or to a legacy, must necessarily comprehend the power to inquire into any waste of the assets.

The court called on

Channell, Sergt., for the respondent. The question of jurisdiction to try a *devastavit* has never been determined. In the present case, the defendant, besides being an executrix, was a trustee, and had no right to call in the debt at an earlier period than that fixed by the testator; and she had besides a discretionary power "to compound or allow time for the payment of any debt."

[MAULE, J. That amounts only to evidence for the defendant upon a question of *devastavit*.]

JERVIS, C. J. The judge must clearly try the question. He seems to have forgotten the old maxim "to amplify." It would be better always, where a judge entertains only doubts as to his jurisdiction, and no party questions his jurisdiction, if he were to exercise it. There must in this case be a new trial, but as the point was raised, not by the parties, but by the judge alone, it will be without costs.

New trial accordingly.

 Moore v. The Overseers of the Parish of Carisbrooke.

MOORE, appellant; THE OVERSEERS OF THE PARISH OF CARISBROOKE, respondents.¹

November. 17, 1852.

County Registration — Value of Estate — Mortgage.

Mortgage interest may be apportioned for the purpose of ascertaining whether the freehold is of the annual value of 40s. above all charges; and therefore a freeholder is entitled to be registered as a voter for the county in respect of freehold land in the county of the annual value of 5*l.*, although such land is, with other land of the annual value of 50*l.*, subject to a mortgage for 300*l.*, the interest of which is 15*l.* a year.

THE following case was stated by the revising barrister for the Isle of Wight: — “John Moore, the appellant, objected to the name of James Sanders being retained on the register of voters for the parish of Carisbrooke. The name of the said James Sanders stood thus in the register of voters: — ‘Sanders, James, — Carisbrooke — Freehold land — Carisbrooke Field, called Edward’s Land.’ It was proved that the said James Sanders was the owner of a piece of freehold land, as above described, of the annual value of 5*l.*, but that this land was, with other land, of the annual value of 50*l.*, belonging also to the said James Sanders, mortgaged for a sum of 300*l.*, and that the interest payable on such mortgage amounted to the sum of 15*l.* by the year. The sole objection made to the said James Sanders being on the register was, that he was not entitled to a freehold estate of the yearly value of 40s. above all charges, inasmuch as, such portion of the said mortgaged premises being liable to the whole of the yearly interest, such interest could not, for the purpose of conferring the franchise, without the consent of the mortgagee, be ratably apportioned upon the whole property contained in the mortgage. The revising barrister was of opinion that the mortgage interest could be so apportioned, and he therefore retained the name of the said James Sanders on the list of voters. If the court should be of opinion that the said decision was erroneous, the name of the said James Sanders was to be expunged from the register of voters.”

Poulden, for the appellant. The interest on the mortgage could not be apportioned; it is payable out of all the mortgage land, and, therefore, the land in respect of which the vote is claimed is liable to the whole of the yearly interest of 15*l.*, and consequently is not worth 40s. a year clear of all charges. The revising barrister had no jurisdiction to inquire into the value of the other lands which were also subject to the mortgage, but his power was limited to the freehold in the county in respect of which the right of voting was claimed.

JERVIS, C. J. According to your argument, a man may have a

¹ 17 Jur. 116. Appeal from Revising Barrister’s Court.

James v. Isaac.

freehold estate of the annual value of 1,000*l.*, and yet be not entitled to vote if there be a mortgage on it, though only for 100*l.*, if the interest on the mortgage should exceed the annual value of that portion of the land in respect of which the voter qualifies. Why cannot the interest be apportioned ?

MAULE, J. A person may have two plots of land in two adjoining counties, each worth 4*l.* a year, and the two mortgaged together for a sum of money, the interest of which might be 3*l.* a year; and if the appellant's argument were right, such person would not be entitled to vote for either county. In the present case the estate is substantially of the annual value of 40*l.*, clear of all charges, and the freehold, in respect of which the right of voting in question is claimed, is of the annual value of one eleventh part of the whole estate. Now, an eleventh part of 40*l.* a year is more than 40*s.* a year. The voter, therefore, was entitled to be registered.

Decision affirmed.

JAMES v. ISAAC and others.¹

November 10, 1852.

Satisfaction of Contract by a Stranger — Rescinding Contract — Pleading.

To an action in *indebitatus assumpsit* for work and labor, the defendants pleaded that the debt accrued to the plaintiff under an agreement, by which the plaintiff agreed with the defendants to execute certain works, on certain terms, set out in the plea; that the plaintiff, after he had commenced the works, stopped the same until another agreement was made with the plaintiff and one T. P., set out in the plea, and by which the plaintiff agreed with the said T. P., for certain considerations, to finish the said works; that the consideration money under the last agreement was paid, and that the plaintiff accepted the same from the said T. P. in full performance of such agreement; and that the plaintiff accepted the last-mentioned agreement, and the performance thereof by the said T. P., in satisfaction and discharge of the said agreement between the plaintiff and the defendants:—

Held, a bad plea on general demurrer.

INDEBITATUS ASSUMPSIT for work and labor, and on an account stated. Plea, by two of the defendants, as to the first count of the declaration, that the said money in that count mentioned, accrued due to the plaintiff under a certain agreement, made on the 1st September, 1847, between him and the defendants, whereby the plaintiff agreed with the defendants to execute and perform all the works necessary in the erection of a church in the parish of Malpas, in the county of Monmouth, agreeably to certain plans, specification, and detail of the same, numbered from 1 to 15 inclusive, provided for that purpose by one John Pritchard, Esq., architect, the whole of the

¹ 17 Jur. 69.

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said works to be performed for the sum of 1,140*l.*, and to the entire satisfaction of the said John Pritchard, the architect therein engaged. And the said defendants further say, that after the making of the said agreement the plaintiff commenced the said works and the said building of the said church, according to the said plans and specification, and continued and proceeded with the same until the 1st August, 1850, when the said works and the said building of the said church were finished and completed. And the said defendants further say, that, during the progress of the said works and of the said building, and before the 18th February, 1850, divers sums of money, amounting in the whole to a large sum, to wit, 580*l.*, were paid to the plaintiff under the said agreement, and by the plaintiff received, as instalments of the said sum of 1,140*l.*, for and in respect of the said works and building of the said church as aforesaid; that after the plaintiff had so received the said sum of 580*l.*, and before the said 18th February, 1850, to wit, on the 26th January, 1850, the plaintiff discontinued the said works and the said building of the said church, and refused to continue the same, or to allow the same to be proceeded with, until he received payment of certain further sums of money, to wit, amounting to 320*l.*, as instalments of the said sum of 1,140*l.*, for and in respect of the said building of the said church. And the said defendants further say, that the plaintiff did then stop the said works, and the same remained so stopped until a certain day and year, to wit, the 18th February, 1850. And the said defendants further say, that thereupon, from and afterwards, to wit, on the day and year last aforesaid, a certain agreement was made between the plaintiff and one Thomas Prothero, of, &c., which said agreement was, and is, in the words and figures following, that is to say—"Whereas I, Benjamin James, of the town of Newport, builder, having agreed to erect the new church at Malpas, mentioned in the within specification and accompanying drawings, for the sum of 1,140*l.*, have proceeded with the said work, and the building is now roofed and covered in, and I have received on account thereof the sum of 580*l.*; and whereas, in consideration of the sum of 200*l.*, to be paid to me by Thomas Prothero, of Malpas-court, as follows—50*l.* now down, the receipt of which I acknowledge; of 50*l.* more on the 4th day of March next; of 50*l.* more on the 18th day of March next; and the remaining 50*l.* on the 4th day of April next—I do hereby agree with the said Thomas Prothero to complete and finish in all respects the said new church, according to the said plans and specification, so that the same shall be ready for consecration and opening on the 1st day of May next, and further, that for the sum that will remain unpaid to me for erecting and completing the said church, I will accept and depend on such subscriptions as have been promised, or can be raised to, and by, the Rev. W. D. Isaac; and further, that the expense of the steeple in the turret, and of the two additional windows in the chancel over the communion-table, shall be paid out of the subscriptions of Mrs. Phipps and the Rev. Thomas Prothero. Dated the 18th February, 1850." That the said Benjamin James, in the said agreement mentioned, is the plaintiff in

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this suit, and that the said Rev. Thomas Prothero, in the said agreement also mentioned, was another and different person from the said Thomas Prothero, party to the said agreement; and that the said Thomas Prothero, party to the said agreement, did, on the said 4th March, and on the 18th March, and on the 4th April, 1850 (all which days elapsed before the commencement of this suit), respectively, pay to the plaintiff the sum of 150*l.*, making up in the whole, with the said sum of 50*l.* in the said agreement mentioned, and thereby acknowledged to be paid, the sum of 200*l.* in the said agreement mentioned; and the plaintiff accepted and received the same of, and from, the said Thomas Prothero, in full and complete performance of the said agreement so entered into between the plaintiff and the said Thomas Prothero as aforesaid. That the plaintiff accepted and received the last-mentioned agreement, and the performance thereof by the said Thomas Prothero, in satisfaction and discharge of the said agreement between the plaintiff and the defendants so made as aforesaid, and of the performance thereof by the defendants. Verification. Special demurrer thereto, on the ground, *inter alia*, that the plea amounted to the general issue.

Lush, in support of the demurrer. The plea shows that there was an executory agreement, under which the work was done, and that, before the defendants became indebted, something took place, which, if it amounts to any thing, would have the effect of making the defendants never indebted. If the plea admits any thing to have been due, it does not avoid it by showing a satisfaction. The plea is also bad on general demurrer.

Raymond, *contra*. In the first place, the plea cannot be objected to on special demurrer, as the Common-law Procedure Act, 15 & 16 Vict. c. 76, s. 51, has abolished special demurrers. The act is retrospective, and applies to demurrers which were pending at the time the act passed.¹

[The court said they would, if necessary, consult the other judges on this point, but they wished the plea to be argued first as on general demurrer.]

The plea is good in substance; it sufficiently shows that the plaintiff agreed to look to a particular party for his remuneration, instead of looking to the defendants. With respect to the agreement being made by the plaintiff with a third person, the case of *Belshaw v. Bush*, 17 Jur. 67; s. c. *ante*, p. 269, shows that that is no objection, and that satisfaction of a debt by a stranger may be adopted and relied on by the defendant in bar of the action.

[MAULE, J. In *Belshaw v. Bush*, the court said that it appeared to them, in that case, that the bill given by Mr. Bush must be taken to

¹ The arguments on this point have been omitted, as in this case it became afterwards unnecessary to decide it; and the point has been since determined in *Pinkhorn v. Sonster*, 16 Jur. 1001; s. c. *post*.

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be a conditional payment on behalf of the defendant, and that it might be adopted, and had been adopted, by the defendant. To make the present case analogous to that, it must be shown that the contract was purported to be made for the benefit of the defendants, and that they have adopted it.]

It is submitted that these defendants might, and have adopted this agreement.

[As to the plea not amounting to the general issue, *Smart v. Hyde*, 8 M. & W. 723, was cited.]

Lush, in reply, was directed by the court to confine his argument to the question of the plea being sufficient in substance. This case is very different from that of *Belshaw v. Bush*, for here there is no accord and satisfaction of the first contract; but before any debt is due under it, a new contract is made with a stranger, the effect of which, if any thing, is to rescind the first contract. Now, to rescind a contract, both the parties to it must consent.

[MAULE, J. Is there nothing in the plea to show that Prothero was not acting on behalf of the defendants, so as to enable the defendants afterwards to adopt it?]

No; nothing of the kind; he does not profess to be acting for the defendants; and, for aught that appears to the contrary, the defendants still may hold the plaintiff liable, under the first contract, to build the church. The agreement with Prothero is wholly a collateral agreement.

JERVIS, C. J. I think that is an answer to it. The plea is bad in substance, and it becomes therefore unnecessary for us to decide the question with respect to the special demurrer.

MAULE, CRESSWELL, and TALFOURD, JJ., concurred.

Judgment for the plaintiff.

BARROW and others, appellants; BUCKMASTER, respondent.¹

November 17 and 20, 1852.

Parliament — County Vote — Apportionment of Rent Charge — Charges — 8 Hen. 6, c. 7 — 10 Hen. 6, c. 2 — 18 Geo. 2, c. 18, s. 5.

The owner of freehold land, on which was a rent-charge, granted a part of it in fee, subject to a certain proportion of the rent-charge. The conveyance contained covenants by the grantor to pay, and to indemnify the grantee against the remainder; there was also a power of distress to the grantee over the residue of the land in case he were compelled to pay

¹ 17 Jur. 117.

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more than his proportion. The rent-charge was thus fairly apportioned, and the residue of the land was sufficient to meet its proportion : —

Held, that in estimating the value of the grantee's land with reference to the county franchise, the apportioned part only of the rent-charge was to be deducted from the annual value; for that the "charges" to be deducted, under the 8 Hen. 6, c. 7, and the subsequent statutes, were such as were ultimately payable out of the land, and not what were primarily charged upon it.

Semle, that in the absence of the covenant of indemnity and power of distress, the same deduction only would be made, the rent-charge being apportionable, at least in equity.

THE following case was stated by the revising barrister for the southern division of Lancashire : — " Henry Buckmaster objected to the names of Corbyn Barrow and seven others being retained on the list of voters for the township of Hulme, upon the same state of facts and upon the same points of law, and the appeals are accordingly consolidated. The facts of the case are as follows : — The several persons whose names are objected to, claimed to be entitled to a vote in respect of an undivided share of two freehold houses which they each held. The ground upon which these houses stand, forms part of a plot of ground which was, on the 31st July last, and still is, charged with and liable to an original chief rent, being a perpetual yearly rent of 14*l.* 1*s.* 7*d.*, payable out of the same to an original grantor, with the usual power of distress. The fee-simple of the plot of land in question, subject to the chief rent above mentioned, became vested in C. D., J. L., and G. W., who granted that portion of it on which the two houses stand in fee-simple to the parties claiming to vote, and others, to the number of ten altogether, as tenants in common. The deed by which such grant was made, recited that the said C. D., J. L., and G. W., were seised of the fee-simple of the land on which the houses stand, 'subject, nevertheless, with other hereditaments, messuages, and premises now belonging to the said conveying parties, to a perpetual yearly rent of 14*l.* 1*s.* 7*d.*' The deed then went on to grant the land on which the two houses stand to the parties above named, 'subject only to a proportion, namely, the sum of 4*l.* 5*s.* of the said yearly rent.' The conveying parties then covenanted to pay the remainder of the said chief rent of 14*l.* 1*s.* 7*d.*, namely, the sum of 9*l.* 16*s.* 7*d.*, and to keep the grantees indemnified against all losses, damages, expenses, and proceedings that might arise by reason of the non-payment of the said 9*l.* 16*s.* 7*d.*, and further covenanted, if default should be made in the payment of the 9*l.* 16*s.* 7*d.*, or any part thereof, and the grantees should be required to pay the same or any part thereof, that thereupon it should be lawful for the grantees to enter and distrain for so much as should have been required to be paid upon the remainder of the said plot of land. The grantees then covenanted with the grantors in a similar manner that they would pay their proportion of the said chief rent of 14*l.* 1*s.* 7*d.*, namely, the sum of 4*l.* 5*s.*, and gave a similar indemnity and power of distress in case of default made. The objection made to these parties was, that their freehold share of the two houses, was not of the requisite value to confer a vote. If, for the purpose of conferring a vote, the annual value of the houses is to be calculated, after deducting any further portion of the original chief rent

charged and payable as aforesaid, than the sum of 4*l.* 5*s.*, being the proportion above named, the value of the houses would not be sufficient to confer a vote on the parties. If no further portion of the original chief rent than the said sum of 4*l.* 5*s.* was to be taken into account by way of deduction, in ascertaining the value of the houses, and the houses to be considered for that purpose as liable only to the payment of the said sum of 4*l.* 5*s.*, the value of the houses would be sufficient to confer a vote on the several parties hereunder named. I decided that, as the land on which the houses stand is still liable, in conjunction with the rest of the plot, to the whole chief rent of 14*l.* 1*s.* 7*d.*, though the parties have a collateral indemnity against the payment of more than the above-mentioned portion of it, the value is insufficient, and I disallowed the votes, and removed the names from the register."

Byles, Serg., (*Aspland* was with him,) Nov. 17, for the appellants.

[MAULE, J. It does not appear from the case that the whole land over which the rent-charge extends is of sufficient value to meet it. It was then agreed that it should be taken that the whole land was sufficient, and that the part not conveyed to the appellants was sufficient to meet the balance of 9*l.* 16*s.* 7*d.*, and that the rent-charge had been fairly apportioned.]

This case depends on the construction of the 8 Hen. 6, c. 7; 10 Hen. 6, c. 2; and 18 Geo. 2, c. 18, and closely resembles the last. — *Moore v. The Overseers of Carisbrooke*, 17 Jur. 116; s. c. *ante*, p. 295. In that case, after the mortgage was apportioned, the land was worth more than 40*s.* a year, and the mortgagor was held entitled to a vote; and there can scarcely be a distinction drawn between a mortgage and a rent-charge. The question to be considered in this and similar cases is simply what the land is actually worth to the claimant after he has put in motion and exhausted all the remedies he has in respect of it. There is here an express covenant to indemnify should the grantees of the land be compelled to pay beyond the share of the rent charge apportioned on their land; and there is also a remedy by distress given them; and even without these remedies they would be entitled, if not at law, at least in equity, to have the charge apportioned and contribution enforced. Story's Eq Jur., ss. 474 *et seq.*; Cary, 3; and see *Curtis v. Spitty*, 1 Bing. N. C. 756. And the result is, that each portion of the land must bear its share, and no more. This has been already decided in the case of a mortgagor. *Moore v. Carisbrooke*; *The Middlesex case*, 2 Peckw. 103; Elliott on Elections, 84, 2d ed. Suppose a man were to grant a rent-charge of 100*l.* out of land worth 500*l.* a year, and then to devise the land in equal portions to five persons, though the share of each would be 100*l.* a year, yet, if the revising barrister's decision be right, not one of the five would be entitled to a vote.

Nov. 20. *Cowling*, for the respondent. Before the 8 Hen. 6, c. 7, the seisin of a freehold, of whatever amount, and however charged, conferred a vote. That statute laid down a general rule, requiring a

freehold of the value of 40s. by the year, above all charges. The statute must be construed as if we were living at the time it passed; it looks only to the issues of real property; and the meaning of "all charges" must be, all charges which exist as legal charges on the land, being "payable" out of it, whether paid or not, 18 Geo. 2, c. 18, s. 5; and this includes a rent-charge which issues out of the land, though it may override other lands. *Gilb. Rents*, 154. The power given to the sheriff of examining "each chooser," how much he may expend by the year, confirms this view. It could not be contemplated that the sheriff was to examine into such a complicated matter as this would be, if the questions as to whether the charges had been duly apportioned, and whether the other land was sufficient to meet their proportion, were to be gone into. The covenant of indemnity here is not shown to bind the heirs, or there might have been no arrangement at all with the owners of the rest of the land overridden by the rent charge. Is the sheriff to examine into all this? If so, he would in many cases have to examine other persons, but the act only mentions the examination of the voter. "What he may expend" cannot be taken literally; it must mean what he can expect to expend, after providing for the charges to which his land is primarily subject. But the matter is not *res integra*; the statute has always been construed literally, and not equitably, that the voter must have a legal estate of 40s. above all charges. *Heywood County Elect*, 62, 63; see, also, *Shep. & War*. The case of *Moore v. The Overseers of Carisbrooke*, has no bearing on this case. The case of mortgages stands on peculiar grounds, and depends entirely on the 7 & 8 Will. 3, c. 25, s. 7. Before that statute, the mortgagor, when the mortgage was in fee, had no vote, however great the ultimate value of the land beyond the charge. That statute bore peculiar reference to mortgages. The effect of it was to convert the legal into an equitable charge. Literally, it made a mortgage no charge at all, and it was so decided in *The Cricklade case*, 2 Peckw. 103, note; s. c. 2 Lud. Elec. Cas. 471. All the consequences of the mortgage, being merely an equitable charge, follow. It is not primarily a charge over any particular part of the mortgaged land, but is equitably distributed, and is only a charge on any particular part if there is a failure as to the interest. See *The Middlesex case*, 2 Peckw. 103, and *The Bedfordshire case*, 2 Lud. Elec. Cas. 452. Rent-charges must, therefore, be considered with reference to one act—mortgages with reference to another.

[MAULE, J. The stat. Will. 3, gives the mortgagor the right to vote, leaving the qualification as to value to be computed as under the old act.]

Byles, Sergt., in reply. The true meaning of the 8 Hen. 6, is "satisfy the sheriff that you have 40s. a year to expend out of the land after all charges have been duly satisfied." The only question is, has he a beneficial interest out of the land of the amount of 40s. *Lee v. Hutchinson*, 8 C. B. 16, s. c. 1 Eng. Rep. 329. In that case, at p. 19, Maule, J., says, "Having the land means having an interest in it, legal or equitable; to entitle him to vote, the party must have an inte-

rest in land of the clear yearly value of 40s.;" and Williams, J., at p. 24, "The different statutes that have since passed upon the subject preclude us from taking the strict lawyer-like view of the word 'charge,' in the 8 Hen. 6, c. 7, and compel us to adopt the popular meaning."

[JERVIS, C. J. It has struck me all along that *Lee v. Hutchinson* was decisive of the question.]

Whether there were an indemnity against the rest of the rent or not, the law would apportion the charge, and the sheriff would have no difficulty in ascertaining the truth of the voter's qualification. There is no distinction, for the present purpose, between a rent-charge and a mortgage. The remedy in the two cases is similar—in the one, ejectment and action; in the other, distress and action.

[He also cited *Webb v. Aston*, 5 Man. & G. 30.]

JERVIS, C. J. I think that the decision of the revising barrister was wrong, and that the claimants were entitled, under the circumstances, to have their names placed on the register of voters. The case does not state, but it is admitted that it must be taken, that the residue of the land is sufficient to answer the balance of the rent-charge beyond the 4l. 5s., and that the rent-charge was properly apportioned. It seems to me that the amount which ought to be deducted from the annual value of the land in respect of which the votes are claimed is 4l. 5s., and not the full sum of 14l. 1s. 7d., which, however, no doubt, is issuing, and distrainable for, out of every inch of the land. It is admitted that the question depends on what is the true construction of the 8 Hen. 6, c. 7, modified slightly by the subsequent statutes, 10 Hen. 6, and 18 Geo. 2. By the original statute the voter must have a legal freehold of 40s. by the year, above all charges. What this means must be gathered from the other parts of the statute, which are an exposition of the qualification required; and from them we find that the sheriff is to examine every "chooser," as the elector is called, "how much he may expend by the year." The correct view, therefore, of the statute appears to me to be that taken by my brother Byles, namely, what is the result after exhausting all legal remedies—might the claimant fairly expect to have a sufficient sum then left to qualify him? If the rent-charge were apportioned he would receive more than 40s., and he might therefore tell the sheriff he had 40s. by the year to expend. But it was objected that, inasmuch as the land is liable to the charge of 14l. 1s. 7d., he cannot expend 40s. But though he is legally liable to pay that sum in the first instance, yet he will be entitled, at law or in equity, to receive an apportionment from the owners of the other land over which the rent-charge extends, and after he has taken an account with them he would be able to expend 40s. I did not quite follow Mr. Cowling's argument as to the analogy between this case and the case of a mortgage. When once the statute of Will. 3 substituted the equitable estate for the legal freehold required by the former acts, then the same rule attaches, and the value of the equitable estate required must be the same, and calculated in the same way as that of the legal freehold. The case of *Moore v. The Overseers of Carisbrooke*, decided, that in

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the case of an equitable estate the actual legal charge was not to be deducted, but that the substantial value of the land, when all the remedies had been exhausted, is what must be looked at, and the same rule must apply to a legal estate. *Lee v. Hutchinson* confirms this proposition, that the substantial value is to be looked at, and that the owner of the land has a right to a vote if he has 40s, issuing therefrom in the result.

MAULE, J. I am of the same opinion. I think the voter is within statute 8 Hen. 6, namely, that he is in a position to expend 40s. by the year. It was pointed out by my brother Byles, and not disputed by Mr. Cowling, that notwithstanding the claimant's land might be distrained upon for 14*l.* 1*s.* 7*d.* a year, yet he may enable himself to spend 40s. out of this land. Mr. Cowling, however, says that the meaning of that statute is, not that he must be able to expend 40s. after enforcing all his remedies and rights, but that he must have 40s. beyond any thing that may be primarily charged upon the land; but Mr. Cowling has not shown any good reason why that should be the meaning of the statute. The words of the statute are intended to point out the requisite pecuniary means of the voters, and not the quantity or quality of their estate; they are not words of technical description, but of a popular nature. The subject of inquiry by the sheriff is to be whether "the chooser may expend 40s. by the year"—words less technical I cannot conceive. On the inquiry the voter would say, "I can spend 40s., for although I may have to pay 14*l.* 1*s.* 7*d.*, yet I can get back 9*l.* 16*s.* 7*d.* from other persons, and then I have more than 40s. left." I think, therefore, that the statute has been properly expounded by my brother Byles. The main argument of Mr. Cowling has no direct bearing on the question before the court. The whole scope of that argument, as far as I could understand it, turned on the statute of Will. 3, (which takes away the right of voting from mortgagees and trustees not in possession), and the supposed general analogy between this case and that of a mortgagor claiming to vote, when it becomes a question how far the interest he has to pay may be the subject of deduction. Mr. Cowling argues that that analogy is not a valid one; yet, even if his argument were logically correct, still it would leave the main question upon the construction of the 8 Hen. 6 untouched. Now, although I think the view which the court takes, sufficiently supported by the direct argument derived from the construction of the 8 Hen. 6, yet I may also add that I think the argument of Mr. Cowling invalid. That ingenious argument turned upon this mode of dealing with the statute of Will. 3. The statute takes away the right of voting from the mortgagee not in possession, and says that the mortgagor shall vote; and that, says Mr. Cowling, is equivalent to turning the equitable estate into a legal one, and, by so doing, conversely turns the legal liability into an equitable liability for the purposes of the franchise; so that, in effect, the mortgagee's right to his interest (though a legal charge as between himself and the mortgagor) shall, for election purposes only, be an equitable right, and, as it were, an equitable charge on the land. Thus,

having got, not the thing, but the mere words into the act, he says we must deal with it with reference to the word "equitable," and that thus the charge comes to be equitably distributed over the whole land. This mode of dealing with the statute is clearly inadmissible. You must not substitute for the words actually used other words capable of some meaning which you wish to impose, but which the original words would not admit of, and then deal with the statute as if it actually contained the substituted words. I am the more satisfied with the view I take, for, giving all the weight to Mr. Cowling's argument which, if valid, it could have, its only effect is that of diminishing the weight of some decisions which have been applied to the present case, such as *Lee v. Hutchinson*, which certainly, in a great measure, substantiates this view. The question is simply, what are "charges" which are to be deducted? The 8 Hen. 6, clearly intended to confine the franchise to persons possessed of a certain position in society with respect to landed property. The effect of that statute was somewhat modified by subsequent statutes; but taking the statutes together, after all, what is to be looked to is, what is the pecuniary ability of the claimant arising out of the land after all his rights and liabilities with respect to it have been adjusted? If he has then 40s. by the year to expend, I should say he was the sort of man the statute intended.

WILLIAMS, J. Both from the principle and intention of the statutes, I think we ought not to look further than the amount of the charge which can ultimately fall on the terre-tenant; and looking thus at the land before us, it appears that, when all rights have been exercised and contribution enforced, any amount which the claimant can be called upon to pay will not diminish his interest below 40s. by the year.

TALFOURD, J. I think the "charges" in the statute are to be taken to mean such as leave the parties charged able to expend 40s. after they have been properly satisfied. Mr. Cowling said the statute must be expounded as at the time of its passing, and that legal estate then only was contemplated. But the inference I draw is, that we ought to calculate the amount issuing out of the land after all practical deductions have been made. *Lee v. Hutchinson* is the exact converse of this case.

Decision reversed, without costs.

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FOSTER and others v. THE OXFORD, WORCESTER, AND WOLVERHAMPTON RAILWAY COMPANY.¹

January 24, 1852.

*Company — Director — Contract by, with Company — Companies
Clauses Consolidation Act, 8 & 9 Vict. c. 16, ss. 85, 86.*

The 85th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, enacts, that "no person interested in any contract with the company shall be capable of being a director, and no director shall be capable of being interested in any contract with the company during the time he shall be a director." The 86th section enacts, that "if any director, at any time subsequent to his election, be either directly or indirectly concerned in any contract with the company, then the office of such director shall become vacant, and he shall cease from voting or acting as a director:—

Held, that if a contract be entered into by a director with the company after his election, it is not rendered void, but the office only of a director is vacated.

Covenant by three plaintiffs against an incorporated company for not accepting goods according to a mutual agreement under seal. Plea, that at the time of making the agreement one of the plaintiffs was a director of the company:—

Held, bad on general demurrer.

COVENANT. The declaration stated a breach of covenant by the defendants, in not accepting a certain quantity of iron rails, according to articles of agreement under seal, (which were set out at length), by which the plaintiffs agreed to supply, and the defendants, incorporated by the name of "The Oxford, Worcester, and Wolverhampton Railway Company," agreed to accept and pay for, 17,560 bridge rails. Plea, that before and at the time of the making of the said supposed articles of agreement, and of the contract therein, and thereby evidenced and expressed, the said John Barker, one of the plaintiffs, was a director of the said Oxford, Worcester, and Wolverhampton Railway Company. General demurrer.

Jan. 24. *Phipson*, in support of the demurrer. The question here turns upon the construction of the 85th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, which enacts, "that no person holding an office or place of trust or profit under the company, or interested in any contract with the company, shall be capable of being a director; and no director shall be capable of accepting any other office or place of trust or profit under the company, or of being interested in any contract with the company, during the time he shall be a director." It is submitted that this does not avoid the contract, but merely disqualifies the director who enters into the contract from being a director, and therefore that the plea is bad. That this is the true construction is shown by the 86th section, in connection with which the 85th section must be read. The 86th section is, "If any of the directors, at any time subsequent to his election, accept or con-

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tinue to hold any other office or place of trust or profit under the company, or be either directly or indirectly concerned in any contract with the company, or participate in any manner in the profits of any work to be done for the company, &c., then in any of the cases aforesaid, the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director." From this it is evident that the legislature contemplated the possibility of a director continuing to hold an office of profit, &c., after his election as a director, and the same interpretation must apply to a contract; consequently a contract entered into by him would not be void; but in either case the same consequence must follow, that is, the office of director becomes vacant.

[MAULE, J. There is no averment in the plea that Barker was interested in the contract. The two sections taken together clearly contemplate that a director may take an office of profit under the company; but that if he does, he becomes disqualified to act as a director; and so of a contract.]

Sect. 87 shows that that is so; for by that section the legislature clearly points out, by implication, that it is the office of a director that is vacated, and not the contract; for it says, "Provided always, that no person, being a shareholder or member of any incorporated joint-stock company, shall be disqualified or prevented from acting as a director by reason of any contract entered into between such joint-stock company and the company incorporated by the special act; but no such director, being a shareholder or member of such joint-stock company, shall vote on any question as to any contract with such joint-stock company." Now, if the penalty intended by the legislature to attach in general on a director being interested in a contract with the company had been the vacating of the contract, the proviso in the 87th section, for the special case of a member of a joint-stock company, would have been, that the contract in such a case should not be void; not that the member of the joint-stock company should not be disqualified as a director. Taking, therefore, the three sections together, it is abundantly clear that the object of the act is to render a person, already interested in a contract with the company, ineligible for a director, and to vacate the office of director if he should subsequently become interested in a contract, but in neither case to avoid the contract.

Gray, contra. By the 85th section a director is prohibited from entering into a contract with the company, and consequently the contract, if he does so, is void. The first part of the section says a contractor shall not be capable of being a director, i. e. if elected, his election is void. The second part says a director shall not be capable of being a contractor, i. e. if a contract is entered into by him, the contract is void. And there is good reason for holding the contract void; for, otherwise, a director having a vote in bringing about his own contract, the interest of the shareholders at large might be seriously prejudiced; and if, by the interpretation the plaintiffs contend for, a director is to be allowed to contract, the very object of the legis-

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lature, which was to protect the general body of the shareholders from the jobbing and disadvantageous contracts of the directors, will be defeated. The 85th section was obviously meant to give security and protection to the shareholders, by rendering it impossible for a director to make a contract for himself with the company.

[JERVIS, C. J. Then you would enlarge the language of the act in order to obviate the mischief you say is intended to be prevented by the legislature?]

Perhaps so, if that were necessary; but the words of section 85 are large enough, and quite capable of this meaning. As to the 86th section, that was intended to meet a different state of circumstances. Suppose, for instance, a director takes an interest in a contract as the legal representative of a deceased relative, with whom the contract was originally made, he is simply disqualified, and the contract is not avoided, as, indeed, it would be unjust that it should be, having been legal in its inception. To such a case the 86th section would apply. But, on the other hand, if a director himself enters into a contract, the 85th section applies, and the contract is void.

[MAULE, J. Suppose a man enters into a contract with the company, and is afterwards elected a director during the continuance of the contract?]

The first part of the 85th section applies — the election is void for any practical purpose.

[MAULE, J. The office of director is clearly vacated by the 86th section.]

Phipson, in reply. There is no distinction, for the present purpose, between the taking an office of profit and the entering into a contract with the company. One is at a loss to conceive what the effect of the 86th section can be when it says, "that if a director, subsequent to his election, shall accept or continue to hold an office of trust, &c., or be concerned in a contract with the company, the office of director shall be vacated," except only to vacate the office of director. That section, therefore, clearly shows that the 85th section was never meant to render null the contract. Moreover, section 87 expressly recognizes that contracts may exist between a director and the company.

JERVIS, C. J. I am of opinion that the plaintiffs are entitled to the judgment of the court. No doubt the mischief pointed out by Mr. Gray may exist; but it is not because a presumed intention of the legislature may not be carried out by our decision, that we are, on that account, to enlarge the language used, and to cause a larger penalty to attach to a contract entered into by a director, than is expressly enacted by the legislature itself. I think that, looking at the three sections together, it is clear that a director, by contracting, vacates his office, and that the contract is not rendered void. The 87th section says that no person shall be disqualified from acting as a director of a company by reason of the company entering into a contract with a joint-stock company of which he is a member; but if Mr. Gray's interpretation of the 85th section be right, still the contract itself is void,

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and the proviso of the 87th section gives no sensible qualification to the general enactment of the 85th section. I think, therefore, that that section simply means, that if a person is concerned in a contract with the company, *ipso facto* he becomes disqualified as a director; and that that is the only penalty which attaches, and that the contract is not wholly prohibited.

MAULE, J. I am of the same opinion, and for the reasons given by the Lord Chief Justice.

CRESSWELL, J. The statute does not say that the contract shall be void, but points out the consequences of such a contract being entered into, namely, the disqualification of the director.

WILLIAMS, J. The statute disqualifies the director, but does not avoid the contract.

. Judgment for the plaintiffs.

LITTLE v. THE NEWPORT, ABERGAVENNY, AND HEREFORD RAILWAY COMPANY.¹

November 25, 1852.

Railway—Tunnel—Deviation—Railways Clauses Consolidation Act, 1845, 8 Vict. c. 20, ss. 13, 14, 15.

The effect of the 13th, 14th, and 15th sections of the Railways Clauses Consolidation Act, 1845, 8 Vict. c. 20, taken together, is, in the case of a tunnel, marked in the deposited plans, that the tunnel must be made in the exact position indicated, and that the line cannot deviate at all at that portion of it without the consent required by the 13th section, or special powers in the local act.

A railway company, therefore, without having this consent or special powers, wrongfully deviated where a tunnel had been marked, have not the duty imposed upon them of constructing a tunnel in the corresponding portion of the deviating line.

Quære, whether a similar construction of the act does not apply in the case of all "engineering works?"

Semle, that a tunnel made "by cut and cover" is a tunnel within the meaning of the act.

COVENANT. The first count recited that, before the passing of the act of parliament by which the defendants were incorporated, the provisional committee agreed with, and promised, the plaintiff, in consideration of his withdrawing his opposition to the bill, that, in the event of its passing, the railroad should be carried, at a certain portion of it nearest the plaintiff's house, by means of a tunnel; that after the act passed, the defendants covenanted with the plaintiff to perform all such agreements and promises as had been made by the provisional committee. Breach, that the defendants had not carried

¹ 22 Law J. Rep. (N. S.) C. P. 39; 17 Jur. 209.

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the railway by means of a tunnel, according to the said agreement and promise. The second count recited that, after the said company had been provisionally registered, the said provisional committee caused to be deposited with the clerk of the peace of the county of Monmouth, a certain plan, in pursuance of the standing orders of the house of commons; [the plan was then set out;] that the centre of the three black lines delineated on the said plan was intended to show the then intended line of the said proposed railway, and the other two of the said three black lines were intended to show the limits within which the said company then proposed to be empowered by the said act to make such deviation in the construction of the said railway from the said centre line as by the said act the said company are empowered to make, and the numbers on the said plan were intended to refer, and did refer, to certain corresponding numbers in the book of reference deposited by the said provisional committee with the said clerk of the peace at the same time as the said plan, according to the said standing orders; whereby it appeared, as the fact was, that the plaintiff was the owner and occupier of one parcel of land, and was also the occupier of certain other parcels of land respectively, abutting on the intended line of railway; that after the passing of the said act of parliament, by a certain indenture made between the plaintiff and the defendants, the defendants covenanted with the plaintiff that if the defendants, in making the said railway, should cause the same to deviate from the said line so marked and delineated on the said plan by the said centre line, and should make their said railway otherwise than in the said last-mentioned line; but within the said limits of deviation; and if, at the time of the making of the said railway in the said deviating line, the defendants should be bound to carry the said railway through so much of the said deviating line as should pass opposite to the spot indicated on the said centre line in the said plan by the words and figures, "tunnel 374 yards," by means of a tunnel, then the defendants would carry so much of the said deviating line by means of a tunnel; that, after the making of the said indenture, the defendants made the said railway, and in so making the same caused the said railway to deviate from the said centre line, and made the same otherwise than in the said last-mentioned line, but within the said limits of deviation. It was then alleged that the defendants, at the time of the making of the said railway in the said deviating line, were bound to carry so much of the said deviating line as passed opposite to the said spot where the said tunnel was indicated as aforesaid by means of a tunnel. Breach, that the defendants carried and made the said portion of the deviating line otherwise than by a tunnel. Pleas, first, to the first count, a traverse of the alleged agreement between the plaintiff and the provisional committee; secondly, to the second count, that the defendants, at the time of making the said railway in the said deviating line, were not bound to carry so much of the said deviating line as is described in the said count by means of a tunnel. Issues thereon. At the trial, before Jervis, C. J., at the sittings in London, after Trinity term, 1852, it appeared that

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the action was directed to be tried by the Lords Justices of Appeal, and that the covenant alleged in the second count was a fiction agreed on to try the liability of the company to make a tunnel on the deviating line, as set out in that count. A verdict was found for the plaintiff on the second issue,¹ with leave to the defendants to move to enter it for them. It was admitted that a tunnel, made as a tunnel, could not be made on the deviating line, but that a tunnel made by "cut and cover" could be made.

Nov. 4. *Bramwell*, Q. C., having obtained a rule accordingly,

Nov. 25. *Crowder*, Q. C., *Byles*, Serg., *Barstow*, and *M. A. Shee*, showed cause. The question for the court is the construction of the 13th and 15th sections of the Railways Clauses Consolidation Act.² It is admitted that a tunnel could be made on the deviation by "cut and cover;" and though the other side contended, on moving the rule, that this was not a tunnel, this contention was by no means successful with the court.

[*JERVIS*. C. J. I do not think the court intended to grant a rule as to that.]

It may be taken, then, that a tunnel is possible on the deviating line. The plaintiff contends that the true construction of the 13th and 15th sections, taken together, is, that where a tunnel is marked to be made at any place, the line must deviate, if it deviates at all, with all its incidents—that is, that a tunnel must also be made in the deviating line.

[*MAULE*, J. On the form of issue raised on the second count you must show that the defendants were entitled to deviate, and then, having deviated, were bound to make a tunnel. It may very well be that the true construction is, that where a tunnel is marked you can-

¹ The verdict on the first issue was found for the defendants. A rule *nisi* (which was refused) was moved for by *Crowder*, Q. C., Nov. 5, for a new trial, on the ground of improper rejection of evidence; but no report of that part of the case is necessary.

² The following are the material parts of the 13th, 14th, and 15th sections:—

Section 13 enacts, that "where, in any place, it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the same shall be made accordingly; and where a tunnel is marked on the said plan or section, as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land in which such tunnel is intended to be made shall consent that the same shall not be so made."

Section 14. "It shall not be lawful for the company to deviate from, or alter, the gradients, curves, tunnels, or other engineering works described on the said plan or section, except within the following limits, and under the following conditions." Then follow clauses as to gradients and curves, and then "it shall be lawful for the company to make a tunnel, not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by a certificate from the board of trade."

Section 15. "It shall be lawful for the company to deviate from the line delineated on the plans deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated on the said plans, nor to a greater extent, in passing through a town, village, or lands continuously built upon, than ten yards, or elsewhere to a greater extent than one hundred yards from the said line," &c.

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not deviate at all. This is an act of parliament intended to operate on future railway acts, and it might well have provisions that ordinarily would be applicable enough, although great inconvenience might arise if they were applied to certain cases, and for these cases there should be a clause in the special act.

JERVIS, C. J. That was what was urged at the trial by the defendants' counsel, that if the plaintiff wanted a tunnel with no deviation in this spot he should have got a clause introduced in the special act.

MAULE, J. If the act said in the most express terms that there should be no deviation where a tunnel is marked, I cannot see that any inconvenience need arise, and therefore the argument from inconvenience is not valid against this construction, where the intention is not so clearly expressed. I can imagine that there are provisions in this act which would be inconvenient, in the extremest degree, in many cases, but then the act leaves it open to provide in the particular acts when the general clauses would be inconvenient; so that when the particular act has no provision for allowing a deviation in a particular place, notwithstanding there is a restriction or deviation in the general act from the fact of a tunnel being shown there, then it may well be that the restriction must be held to remain in operation. Matters depending on the physical conformation of particular localities are of all things the most fit for special legislation. Now, putting out of the question for a moment the actual words used in the act, I should say that the convenient construction would be the one that would leave the landowner quiet when he once saw a tunnel proposed, and not compel him to watch the act, lest a possible deviation might deprive him of his tunnel; that would be convenient for him; and then let the company make all the tunnels put down in the plan, and if they want to deviate, let them apply for a special clause in their act, thus giving notice to the landowner. If this interpretation be the true one, that when a tunnel is shown, there can be no deviation without special powers or consent from the landowner or occupier, the defendants are entitled to succeed on this issue; for if they have no power to deviate, they can have no obligation to make a tunnel in their deviating line, whatever other liabilities they may have incurred by deviating wrongfully.]

Surely it does not lie in the defendants' mouth to say that they have committed a trespass; and in answer to a charge by us of having done wrong by not making a tunnel on our land, to say, "We have previously committed another wrong, for we have deviated, and therefore we are not bound to make a tunnel where we have deviated."

[MAULE, J. If a compulsory order to make a tunnel is not provided by the statute as a remedy to be used against the company in case of deviation, you have your remedy by trespass; that surely is not an inadequate remedy.]

The action of trespass would not remedy the injury done to a man's land; it may be most important to him that the surface should not be disturbed, and that the railroad should be covered over.

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[JERVIS, C. J. You would be able to compel that, by bringing an action of trespass every time a train passed, unless you have been improvident enough to sell the whole land.]

Suppose, on the faith of having a tunnel, we have sold the land, then, as the defendants deviate through their own land, case is the only remedy we should have — an inadequate remedy, not commensurate with the injury and annoyance. But the deviation in the act is mentioned in general terms; the 13th section does not say that you must not deviate where there is a tunnel marked, nor does the 15th section make any exception in the power of deviation, except as to the distance from the centre line. So that the reasonable construction of the two sections is, that where a tunnel is marked "in any place" in the line, a tunnel must be made at that place, whether actually in the original centre line or in the corresponding part of the deviating line; and the limit of deviation in the 15th section will be 100 yards in general, but in the case of a tunnel, only to the extent to which a tunnel is possible. By this interpretation no inconvenience accrues either to the landowner or the company; the one is sure of getting a tunnel where he expects it, and the others know that they can only deviate to the extent to which the physical conformation of the locality will allow them, by affording depth for a tunnel.

[MAULE, J. A tunnel is a very special kind of work; the act treats it in connection with viaducts, &c. It may well be that the legislature intended that the landowner and company should have a specific warning where it must be constructed, namely, in the very place shown on the plan, "the same shall be made accordingly." Moreover, the length of a tunnel is marked on the plan, and that might be altered by deviation.]

So is the length of land to be taken of each owner, and yet that also might be, and frequently is, altered by deviation. All that is required is, that the plan should show whereabouts a tunnel is to be made.

[JERVIS, C. J. By deviation within the limits, the line may possibly be carried where a tunnel would be necessary, though none is marked on the plan; could the company make that?]

There is a clause providing for such a case.

[MAULE, J. That is in the 14th section, and that section appears to be very important, though neither side have alluded to it; it seems conclusive against any general power of deviation in the case of a tunnel. (His lordship read the first part of the section.) It then permits the inclination of the gradients to be diminished or increased to a certain extent, and to such further extent as shall be certified as safe, and not to the prejudice of the public interest, by the board of trade. There is a similar provision as to the diminution of the curves, and then it proceeds — "it shall be lawful for the company to make a tunnel, not marked on the plan, instead of a cutting, or a viaduct instead of an embankment, if authorized by such certificate from the board of trade." Thus the three sections, in the construction already intimated by the court to be the true one, will be a consistent whole.

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Where there is a viaduct marked (which is of great public consequence), there it must be made; where a tunnel (which is of consequence to the landowner), there it must be made, unless the owner and occupier shall consent to its not being made. Then the only deviation or alteration allowed as to tunnels and viaducts is, that a tunnel or viaduct may be substituted, by leave of the board of trade, for a cutting or embankment; and then follows a general power of deviation of the whole line, in less important parts of it.]

It follows, then, that no deviation or alteration can be made in any thing that comes within the term "engineering works," unless a power to that effect is inserted in the special act; and wherever a railway company have deviated in such a case they are liable to an action of trespass.

[MAULE, J. Yes; if they have altered any thing that is an engineering work within the meaning of the 14th section, they have done what that section expressly prohibits.]

Would not the more reasonable construction be this, that you shall not alter any curves, &c., and substitute others and different works for them? "Deviating from," as regards the subjects of the 14th section, must mean deviating from the species of work laid down—the tunnel must be as long, as high, as wide, and so on; for it is to be observed that the general power given in the 15th section necessarily involves some lateral deviation and alteration in the curves, gradients, &c.; and so the word "accordingly," in the 13th section, need not have any such strict meaning given to it as "on the very spot shown;" and the plans deposited may well be interpreted to say, if translated into words, a tunnel shall be made in this place, in the landowner's property, either on the black line, showing the first proposed line, or within the other two lines, showing the limits of possible deviation. Such an interpretation of the plan is obviously consistent with the interpretation of the 13th section for which the plaintiff contends; and that interpretation of the 13th section would leave the parties exactly in the same relative situation as would the interpretation thrown out by Maule J.

JERVIS, C. J., intimated to the counsel for the defendants (Bramwell, Q. C., Sir T. Phillips, and G. R. Clarke) that the court were prepared to make the rule absolute, on the ground that the defendants had no power to deviate; on which intimation they declined to argue in support of any other construction of the statute.

JERVIS, C. J. The issue raised on this record (which must be taken to be the question the parties intended to try, as the pleadings were agreed upon between them) is, whether the defendants are bound to construct a tunnel on their present line of railway, which is a deviating line, within the general limits of deviation. A previous question necessarily arises; can a railway company deviate where they have marked a tunnel in their plan? I think that in such a case they cannot; and if they cannot deviate, it follows that they cannot be obliged to erect a tunnel on their deviating line. My brother

Maule has pointed out that there is good reason for thus holding. Viaducts, arches, and tunnels, mentioned in sect. 13, and to which the restriction applies in sect. 14, are matters of great importance to the public for the sake of security, and to the landed proprietors in respect of the accommodation of their land; and it is natural that they should be specifically provided for by contract between the parties or by the special act, and they would not be expected to be the subject of provisions in the general act. If, therefore, it were contemplated by a company to deviate where a tunnel is originally marked on the plans alluded to in the special act, it might not be inconsistent with the general provisions to have a provision in that special act enabling them to deviate with, and perhaps to deviate without, a tunnel. There is nothing in the sections of the general act now under consideration, or in the subject-matter of them, which calls for a construction other than that which the exact meaning of the words warrant; nor is there any hardship in this construction, as the act is a mere basis for special legislation. That being so, we are bound to put such a construction on the words as they may fairly warrant, and not to strain them in order to obviate any injustice in a particular case. It is remarkable that sect. 13 draws a distinction between viaducts and tunnels; the former can in no case be altered, the latter only with the landowner's and occupier's consent. The fair meaning of the section is the literal meaning—"where a tunnel is marked as intended to be made at any place, the same shall be made accordingly"—at that very place, not anywhere within the general limits of deviation; and so of a viaduct. And that that is the proper meaning is shown by the 14th section, which says, that it shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, and other engineering works described on the plan or section, except within the following limits, the only exception as to tunnels being the substitution of a tunnel for a cutting—the converse of the present case. Now, how can any one doubt that a man does substantially deviate as much in a tunnel as in any other part of the line, if he deviates and carries the tunnel otherwise than on the line originally marked? By so doing, the tunnel is, at all events, altered in position. I think, therefore, it is plain that where a tunnel is shown, that must be the spot where it must be made, and that there can be no deviation or alteration in the tunnel shown on the plan. If that is so, then sect. 15, which gives the power of deviating generally, must be read in conjunction with the 13th section—"it shall be lawful to deviate from the line delineated within certain limits, &c., except as before provided in the case of tunnels and other works." And thus sects. 13, 14, and 15 become one comprehensive scheme, namely, where there are viaducts or tunnels shown, in that place they must be made, and not altered or deviated from; but, subject to those exceptions, the company may deviate and otherwise alter the line delineated. These exceptions are no hardship on the company, because they may obtain powers by their special act to do more than the general act allows; and there is thus no hardship on the landowner either, who will have the exact thing shown, or notice of

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the special alteration; and thus both parties are properly protected. I think, therefore, that the plain sense of the words must be followed, and that they compel us to arrive at the above conclusion. The verdict, therefore, must be entered for the defendants.

MAULE, J. I am of the same opinion. We are not compelled to give the decision we do on any nice construction of words, nor is there any necessity for straining the meaning of them. Our decision is arrived at by leaving to the words the true meaning belonging to them, and that without in any degree interfering with, but rather promoting, what would appear to be the intention and object of the legislature. The act of the 8 Vict. is not intended to enact specifically for all railways. Each railway has its individual and local variations, and it would be neither convenient, nor, perhaps, possible, to make these the subject of general provisions. Local peculiarities must be left to local provision; yet there are many things which are common to almost all railways, and may well be made the subject of general enactments. This act, which applies to such subjects of general occurrence, is very salutary in two respects, it shortens the length of the particular local acts, by enabling companies to adopt all the clauses considered applicable to the particular railway which are furnished by this act, by that means lessening the trouble and expense of passing the local acts; and it also produces uniformity in the Railway Acts, and at once makes a decision, which has taken place in respect to one, applicable to, and a precedent for, another; whereas, if similar intentions were to be carried into effect by different forms of words, questions would continually arise, whether the words used by one act were to have the same interpretation as similar, though not identical words in another. Thus litigation is prevented by the scope and policy of the general act; but nevertheless that scope is to leave things fit for local provision to local provision. Now, tunnels and other engineering works, as far, at least, as variations may be required in them, are matters for which it would be almost impossible to legislate generally, and are, therefore, eminently fitted for local provision. Accordingly, the enactments as to tunnels in the general act are plain and simple. Sect. 13 says, "Where a tunnel is marked on a plan as intended to be made at any place, the same shall be made accordingly." That seems clear enough, that where a plan lays down a tunnel at a particular place, it shall be made there. Sect. 14 throws light on the preceding section, if it wants it—it is remarkable that sect. 14 should have escaped the notice of counsel in the first instance; and though subject by them to considerable torture, it has come out of the rack with its natural dimensions, and speaking its natural voice;—it says, in effect, that where any engineering work is described on the plan, such as a tunnel, you shall not deviate from or alter it, except within certain limits and conditions, none of which comprehend the present case; and if you desire to do so, you must provide for it in your special act; and such a provision would be for something which is applicable in that particular place to that particular tunnel, and thus it would be feasible enough; but

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it would be impossible, without provisions of enormous length and detail, to provide, by a general act, for each particular case. Giving the above meaning to the 14th section, it is very clear that the general power of deviating contained in sect. 15 would be quite discordant with the 14th section, as well as the 13th, unless it were understood and interpreted, with reference to those other sections, as not comprehending engineering works. Now, as there is no express provision in the local act, the parties must be taken — the company on the one hand, and the public on the other — to be satisfied, with respect to the tunnels and other engineering works, that the company should be bound to make them according to the provisions of the general act. And taking the three sections together, I think it clear, as I have said, that they were bound to make them as laid down in the original line, and that they had no power of deviating at all. The question then arises — having deviated, though having no legal power to do so, have the company the duty imposed upon them of making a tunnel in the deviating line? Not having the power, they cannot have the duty. They may have done a wrong to the plaintiff by deviating; but his present ground of complaint is not the not making of a tunnel in the original line, where they had the duty imposed to do so. In omitting to do that, they may have made themselves liable to an action, or other consequences. So also for deviating; but that does not in itself, without evidence of any contract, impose on them the liability to make a tunnel in the deviating line. This would be a natural subject enough of agreement; and it is alleged in the first count that there was an agreement between the parties, with a covenant to make a tunnel at this part of the line; but that is now out of the question. On the whole it seems clear, that under the act, according to the words, and according to its spirit, and from the occasion and purpose for which it passed, the company had no power to deviate from the line, so as to make it not pass through the tunnel laid down on the plan, as they were bound to carry it; and that being so, the wrong they have been guilty of in having deviated where they ought not does not impose on them the special duty of making such a tunnel in their deviating line, though they may be in the situation of wrong-doers, subject to such remedies as the law may afford to those who are suffering from the wrong. For the above reasons, I think there must be judgment for the defendants.

WILLIAMS, J. I am of the same opinion. Applying the ordinary rules of construction to the language used in the three sections, it is impossible to come to any other conclusion.

TALFOURD, J., concurred.

Rule absolute.

 Twyman v. Knowles.

 TWYMAN v. KNOWLES.¹

January 13, 1853.

Evidence — Where a Writing, Parol Evidence not Admissible of Duration of Tenancy.

In an action of trespass, where the plaintiff proves by parol that he occupies the premises under a written agreement from W., and the defendant produces a lease from W., made and taking effect about the time of the acts complained of as trespasses; in order to entitle him to more than nominal damages, the plaintiff must show the duration of his interest, which he can only do by the written instrument.

ACTION for breaking and entering a close of the plaintiff in his occupation, and pulling down a party wall, and breaking open a gate, &c., of the plaintiff, and putting rubbish, &c., on the said close. Pleas—first, not guilty; secondly, that the close, wall, gate, &c., were not the plaintiff's. At the trial, before Jervis, C. J., at the sittings for Middlesex, after Michaelmas term, 1852, it appeared in evidence that the plaintiff had had possession of the land in question, down to the time of the acts complained of, since August, 1850, at which time he took it from one Winterflood, who said that there was a written paper, (which was not produced); that 5s. were paid at the time; that he had applied for rent, but had not received any. The counsel for the defendant objected to any further parol evidence of the plaintiff's tenancy being given, and put in an agreement, by which Winterflood let the piece of land to the defendant from the 16th July, 1852, (the day it bore date, and on which it was made), which was about the time of the first act complained of as a trespass. The lord chief justice, in summing up to the jury, said, "This may be the case of an easement, or perhaps a conditional agreement to go out if the rent was not paid. Without the production of the agreement, there is no evidence of any tenancy; you cannot presume a tenancy from year to year, or at will, from the mere fact of the plaintiff holding, and having paid 5s." The jury gave a verdict for the plaintiff, with 1s. damages.

Jan. 13. *Horn* moved for a new trial, on the ground of misdirection. The learned chief justice ought to have left the evidence given on the part of the plaintiff to the jury, as evidence of a tenancy by the plaintiff at the time the trespasses were committed by the defendant. The mere fact of a letting was sufficient; it is unimportant what the tenancy was. If, putting it at the lowest, it was only a tenancy at will, that was sufficient, as there had been no determination of the tenancy. *Rex v. The Inhabitants of Holy Trinity*, 7 B. & Cr. 611, shows, that the fact of a tenancy may be proved by parol; and *Strother v. Barr*, 5 Bing. 136, is to the same effect,

¹ 17 Jur. 238.

though the court were divided. The plaintiff contends that the parol evidence given of possession is evidence of a tenancy.

[MAULE, J. There are modes of possession which raise a relation different from that of landlord and tenant; as that of agent or bailiff, or for some qualified object. The question of the expiration of the tenancy did not arise in the cases cited. Granting all those cases to be right, you want to show something further; you want to show that the tenancy was subsisting when the lease was granted to the defendant; for the amount of damages must be restrained by the duration of the plaintiff's interest.]

Some of the trespasses occurred before the 16th July; the defendant then could have had no right as against the plaintiff, who was in possession.

[CRESSWELL, J. Admitting that the plaintiff had some sort of holding after the first trespass, why are we to assume that the jury did not give damages for all the time the plaintiff had the premises? The plaintiff does not show how long he was entitled to hold them.]

MAULE, J. I think that the rule must be refused. This case differs from the cases cited; for the material matter to be proved was not merely the existence of a tenancy, but, for the purpose on which the plaintiff now seeks to disturb the verdict, it was necessary to show the duration of the plaintiff's interest in the premises. Now, perhaps, the plaintiff shows that he had some kind of tenancy of the land, and he recovers 1s. damages; in order to entitle him to recover more, he must show the *quantum* of his interest. Now, all the evidence he gives is parol evidence that a man granted the plaintiff a lease in writing of some kind, and some time after granted a lease of the same premises to the defendant, which lease was put in evidence by him. The jury, on this evidence, considered that the tenancy existed up to the first trespass of the defendant, but were not satisfied that it lasted longer, and have found 1s. sufficient to meet the damage sustained on the facts proved before them. The substance of the lord chief justice's summing up seems to have been that "in order to recover more than nominal damages the plaintiff must show the duration of his tenancy; (he does not profess to be owner in fee, or any other way, of the land); he has not shown it, and he has the means of showing it, for he has a lease of some kind; and as he does not produce it, the presumption is, that its production would do him no good." I should think that that is correct. But without reverting to the summing up, it is sufficient to say, that it was necessary for the plaintiff, in order to entitle him to more than nominal damages to show the extent of his interest; this he did not do, and it was the duty of the jury to find as they did.

CRESSWELL, J. I am of the same opinion. It is admitted that another person was seised in fee, and the plaintiff did not prove any interest beyond a bare act of possession. He holds under Winterflood, but what interest he took under him is not before the court, for the instrument by which he held was not produced. The plain-

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tiff, therefore, chose to rest his case on such an interest as could be inferred from a bare act of possession — a mere nominal interest, in fact, entitling him to nominal damages. Therefore, independently of any other question, he got all the damages he could be entitled to.

JERVIS, C. J., and WILLIAMS, J., concurred.

Rule refused.

MARKER v. KENRICK.¹

January 20, 1853.

Covenant or Case — Election.

A lessor may sue in case for injury to his reversion, though the injury is the working a mine, contrary to the terms of the lessee's covenant, and for the committing of which an action on the covenant would lie.

CASE. The declaration stated, that before and at the times of the committing of the grievances thereafter mentioned, the defendant was tenant to the plaintiff of divers beds, veins, seams, and mines of coal, cannel, slack, ironstone, and other minerals, with the appurtenances, in the parish of Ruabon, in the county of Denbigh, for a certain term of years, the reversion of and in the same bed, veins, seams, and mines of coal, cannel, slack, ironstone, and other minerals respectively, then and still belonging to the plaintiff; and it was the duty of the defendant, as such tenant, to work and manage the said beds, veins, seams, and mines in a proper and tenantlike manner; yet the defendant, well knowing the premises, and contriving and intending to injure and aggrieve the plaintiff in his reversionary estate and interest of and in the said beds, &c., and whilst he, the defendant, was tenant thereof as aforesaid, and whilst the plaintiff was so interested therein as aforesaid, to wit, on &c., worked and managed the said beds, &c., in an improper and untenantlike manner, and then, to wit, on the several days and times aforesaid, wrongfully and unjustly, without the leave or license, and against the will of the plaintiff, cut, made, dug, bored, and broke through a certain barrier, to wit, of coal, which formed and ought to have been left as the boundary between the said mines of the plaintiff and a certain other mine adjoining thereto, and thereby then caused and permitted large quantities of water to escape, run, and flow from the said other mine into the said mines of the plaintiff, and to flood the same; and then also, to wit, on the several days and times aforesaid, wrongfully and injuriously made, and caused and procured to be made, certain roads, ways, and communications between the said mines of the plaintiff and the said other mine, and by and through the said roads, ways, passages, and communications carried and brought divers large quantities of coal,

¹ 17 Jur. 44.

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gotten from the said other mine, into, upon, and through the said mines of the plaintiff, and then deposited divers large quantities of earth, spoil, and rubbish in and upon the said mines of the plaintiff, and kept the same so deposited thereon, to wit, from thence thitherto, and by the means and in the manner aforesaid rendered the said mines of the plaintiff less workable than they would otherwise have been; by reason of which premises respectively the said beds, &c., of the plaintiff were greatly injured and deteriorated in value, and rendered less productive and profitable than the same would otherwise have been, and the plaintiff had been greatly injured, prejudiced, and aggrieved in his said reversionary estate and interest therein.

Plea, *inter alia*, that one Edward Lloyd Kenyon, before and at the time of making the indenture therein mentioned; was seised in his demesne as in fee of and in the tenements and premises thereafter mentioned to have been demised. The plea then set out the indenture, as an indenture made between the said Elizabeth Lloyd Kenyon, of the one part, and one Edward Evans Gomer Roberts, Evan Hughes, and Evan Jones, of the other part, and by which it appeared that the said Edward Lloyd Kenyon demised unto the said Edward Evans Gomer Roberts, Evan Hughes, and Evan Jones, all and every the said beds, veins, seams, and mines, &c., in the declaration mentioned, with full liberty and power for the said Edward Evans Gomer Roberts, Evan Hughes, and Evan Jones, their executors, administrators, and assigns, servants and workmen, to enter upon the said lands and grounds, and to make and sink such pits or shafts therein for the getting and raising coal, cannel, slack, and ironstone, and to set up, drive, cut, dig, build, erect, and make, in and through any part or parts of the said premises (except within ten yards under the dwelling-house and outbuildings thereon), such roads, watercourses, drains, levels, whimseys, and engines, and other devices, as should be necessary or convenient for the carrying on the said works, and draining the same, and to do such other acts, matters, and things as in the said indenture more particularly mentioned and described (except as in the said indenture excepted), to hold from the 24th June, 1840, for twenty-one years, paying to the said Edward Lloyd Kenyon certain royalties. The indenture contained also a joint and several covenant by the said Edward Evans Gomer Roberts, Evan Hughes, and Evan Jones, with the said Edward Lloyd Kenyon, that they, the said Edward Evans Gomer Roberts, Evan Hughes, and Evan Jones, their executors, &c., should and would at all times during the said demise, by and with a sufficient number of workmen, carefully and diligently use their best endeavors to find out and discover all such mines, beds, and veins of coal, &c., as could or might be found in or under the said demised premises, and should and would at all times during the continuance of the said term, constantly carry on and effectually work the said beds, &c., so described as aforesaid, in a fair and husbandlike manner, with a sufficient number of experienced and able miners, not fewer than twelve at any time, provided the cannel, coal, slack, and ironstone that should be from time to time gotten and raised should be disposed of for profit; and also should and would keep open one pit

at least, constantly and effectually, during the said term, unless prevented by waters or other inevitable accidents; and also should and would make such watercourses, &c., and other devices as should from time to time be necessary and convenient for effectually carrying on and draining the said works. The indenture also contained a covenant by the said Edward Lloyd Kenyon for quiet enjoyment; and the plea averred an assignment by the said Edward Evans Gomer Roberts, Evan Hughes, and Evan Jones, to the defendant, of the demised premises, for the residue of the said term, and deduced the title of the reversion of the premises to the plaintiff. The plea concluded by averring that the alleged grievances were, and consisted of, a carrying on, managing, and working of the said demised mines, &c., in a particular manner, and that the manner of carrying on, managing, and working the mines was provided for by the said covenants in the said first-mentioned indenture in that behalf contained as aforesaid, which remained in full force. Verification. Demurrer thereto. Joinder therein.

Lush, in support of the demurrer. It is said by the defendant that the plaintiff ought to have sued on the covenant, and that the action on the case does not lie for the acts complained of. That is not so, for it is clear that what the declaration complains of is an injury to the reversion, for which an action on the case might be maintained; and it has been decided that a person does not lose his right to sue in an action on the case because he may also sue in covenant, but he has his election in which form to bring his action. The case of *Kinlyside v. Thornton*, 2 W. Bl. 111, is expressly in point; and *Muskett v. Hill*, 5 Bing. N. C. 709, is also an authority that a party may in some cases have his election, and bring either covenant or case. *Boorman v. Brown*, 3 Q. B. 511; 2 Wms. Saund. 252 a., note 7, is to the same effect. In the next place, this is not a matter for which an action of covenant could have been brought, for the grievances are not mere breaches of the covenant in the lease, but are wholly in the nature of waste. The plea does not say that the working was in a fair and husbandlike manner; and what the declaration complains of is not, it is submitted, within the purview of the lease, which is for the working of the mine, whereas the acts complained of relate to the destruction of the mine.

[CRESSWELL, J. No, that is not so; the working through the boundary does not destroy the mine. The complaint is, the working the mine in an improper and untenantlike manner.]

At all events, the action on the case will lie, notwithstanding the lease.

Brown (Welsby with him), contra. If no action of covenant will lie for the grievances complained of, no action at all will lie; for the lease is to work the mine in a particular way, and there is a covenant on the part of the lessor for quiet enjoyment, without suit, &c., during the term granted; and therefore, unless what is complained of be contrary to the covenant on the part of the lessees, the bringing of

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this action would be a violation of the lessor's covenant for quiet enjoyment.

[JERVIS, C. J. The tenant may have kept the covenants in working the mine, and yet injured the reversion by working through the barrier.]

There is an express covenant in the lease as to the working of the mine, and if the working complained of was improper, it amounted to a breach of the covenant. The main point is, however, whether the plaintiff has any option; it is submitted that he has not, and that if the acts complained of are breaches of the covenant, he cannot sue for them in an action on the case; *Schlencker v. Moxsy*, 3 B. & Cr. 789, which shows, that where there is an express contract by deed between the parties, *assumpsit* cannot be brought on an implied promise; the remedy must be alone on the deed. *Baber v. Harris*, 9 Ad. & El. 532, confirms this.

JERVIS, C. J. I am of opinion that the plaintiff is entitled to our judgment. The case of *Kinlyside v. Thornton*, is directly in point. That has decided that an action on the case, in the nature of waste, will lie, as well as covenant, for the breach of that contained in the lease.

MAULE, CRESSWELL, and WILLIAMS, JJ., concurred.

Judgment for the plaintiff.

WILLIAM JARVIS (on behalf of himself and EDWARD ELKES), appellant; JOSHUA JOHN PEELE, Town-Clerk of SHREWSBURY, respondent.¹

November 13, 1851.

Registration — Residence.

A, a freeman of the borough of Shrewsbury paying scot and lot, for upwards of two years last past, and down to the 25th of March, 1851, occupied and resided in a house on the Wyle Cop, within the ancient and present limits of the borough, and, since the 25th of March, down to and on the 31st of July, occupied and resided in a house at Coton Hill, without the ancient but within the present limits of the borough. The revising barrister, holding him to be disqualified by the 2 Will. 4, c. 45, s. 32, expunged his name from the list of freemen voters:—

The court, without hearing any argument (the counsel for the respondent admitting that he could not support it), reversed the decision.

JOHN MANSELL objected to Edward Elkes having his name retained on the list of voters as a freeman for the borough of Shrewsbury.

The right of voting, previously to the passing of the statute 2 W.

¹ 11 Common Bench Rep. 15.

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4, c. 45, was in the burgesses inhabiting, on the day of election, within the borough of Shrewsbury, or in the suburbs thereof, paying scot and lot, and not receiving alms or charity.

The present boundary of the borough, as defined by the statute 2 & 3 W. 4, c. 64, is more extended than the limits of the ancient borough.

It was proved that Edward Elkes was a freeman of the said borough; that, on the 31st of July, 1851, he occupied and resided in a house on the Wyle Cop, in the parish of St. Julian, within the limits of the ancient and present borough, and that he had so occupied and resided in that house from the 25th day of March last, and up to the time of the revision; that, for upwards of two years last past, and up to the said 25th of March, he had occupied and resided in a house and premises at Coton Hill, in the parish of St. Mary, without the ancient limits of the borough, but within the present limits; that he had been duly rated to, and had paid, his rates and taxes for both houses and premises, and had resided within the ancient and present limits of the said borough since the 25th of March last, and prior to that time, and for two years, within seven miles from the polling place of the said borough, and within the limits of the new borough.

On behalf of Edward Elkes, it was contended that he was possessed of the requisite qualification on the 31st of July, and therefore entitled to have his name retained on the list.

It was objected, that, under the statute 2 W. 4, c. 45, s. 32, Elkes was not entitled to vote as a freeman, by reason of his residence, and paying scot and lot for the dwelling-house on Wyle Cop, within the ancient and present limits of the borough, on account of such occupation and residence being for less than six months before the 31st of July; and that his residence at Coton Hill, within the present limits, but not within the ancient limits of the borough, though within seven miles from the polling-place of the said borough, did not, with the subsequent residence in the borough, confer the right to vote.

The revising barrister held the objection good, and expunged the name of Edward Elkes from the list.

The case of William Jarvis, whose claim as a freeman of the borough rested upon grounds similar to the above, and was in like manner disallowed, was consolidated with the principal case, and Jarvis was named appellant, to prosecute such consolidated appeal, and the town-clerk of Shrewsbury respondent.

Whateley appeared for the appellant; but

Selfe, who appeared on behalf of the respondent, admitting that he was unable to support the decision of the revising barrister, the appeal was allowed, without argument.

Decision reversed.

Sheddon v. Butt.

SHEDDON, appellant; BUTT, respondent.¹

November 13, 1851.

Appeal Copies of Paper-Books.

The court refused to hear an appeal (or to allow it to stand over), where the appellant had failed, on the respondent's default, to deliver copies of the case to the junior puisne judges.

UPON this case being called on, it appeared that no paper-books had been delivered to the two junior puisne judges, whereupon the court ordered the appeal to be struck out.

Poulden, for the appellant, who had in due time delivered paper-books to the lord chief justice and the senior puisne judge, prayed that the case might be allowed to stand over, to give him time to supply the omission. He referred to *Newton v. The Overseers of Mobberley*, 2 Com. B. 203; s. c. 1 Lutw. Reg. Cas. 335, and *Newton v. The Overseers of Crowley*, 2 Com. B. 207; s. c. 1 Lutw. Reg. Cas. 335, where, the appellant having neglected to give the notice required by the 6 & 7 Vict. c. 18, s. 64, the respondent having agreed to waive it, the court postponed the hearing of the case, in order to give the appellant an opportunity to comply with the statute.

JERVIS, C. J. The court can only entertain these appeals according to the ordinary rules and practice as to special cases. To do otherwise, would be directly acting in the teeth of the act of parliament.² The cases referred to are not to the point; the court there proceeded, perhaps correctly, on the ground that the appellant had been "lulled into security by the supposed waiver." The appeal must be struck out.³

The rest of the court concurring,

*Appeal struck out.*⁴

¹ 11 Common Bench Rep. 29.

² The 50th section of the 6 & 7 Vict. c. 18, enacts, "that all appeals or matters of appeal from or in respect of any decision of any revising barrister entertained in manner thereinbefore mentioned [s. 42,] shall be prosecuted, heard and determined in and by her Majesty's Court of Common Pleas at Westminster, according to the ordinary rules and practice of that court with respect to special cases, so far as the same may be applicable, and not inconsistent with the provisions of this act, or in such manner and form, and subject to such rules and regulations, as the said court, from time to time, by any rule or order made for regulating the practice and proceedings in such appeals, shall order and direct."

³ See *Allen*, appellant, *Waterhouse*, respondent, 7 Scott, N. R. 485; s. c. 1 Lutw. Reg. Cas. 93 (a), where the respondent having delivered paper-books to the two junior puisne judges, but none having been delivered to the lord chief justice and the senior puisne judge, the court allowed the case to stand over.

⁴ The practice as to the delivery of paper-books is regulated by the rule of Hilary Term, 4 Will. 4, s. 7, which provides, that, "four clear days before the day appointed

Newman v. Graham.

NEWMAN v. GRAHAM.¹

June 2, 1851.

Special Jury.

Where the defendant has duly obtained a rule for a special jury, and the jury has been struck and reduced, it is not competent to the court to direct that the cause be tried by a common jury, on the defendant's failure to summon a special jury.

BRAMWELL, for the plaintiff, moved for a rule calling upon the defendant to show cause why this cause should not be tried in its order, and by a common jury, unless the defendant should cause a special jury to be summoned. It appeared that the rule for a special jury was obtained, and that the jury had been duly struck and reduced, but that, when the cause was called on, it was found that no jury had been summoned.

[JERVIS, C. J. Why did not the plaintiff summon the special jury?]

He swears that he was not aware of the defendant's default, and his attorney was uninformed as to the practice.

[CRESSWELL, J. The statute 3 G. 2, c. 25, s. 15, is imperative, that the jury struck shall be the jury to try the issue.]

The Court of Exchequer has repeatedly done that which is now asked.

JERVIS, C. J. And so has this court; but not very recently. It is not competent to any court to repeal a positive enactment of the legislature. The practice on the subject is quite settled.²

The rest of the court concurring,

Rule refused.

for argument, the plaintiff shall deliver copies of the demurrer-book, special case, or special verdict, to the lord chief justice of the King's Bench or Common Pleas, or lord chief baron, as the case may be, and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and, in default of either party, the other party may,* on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies."

¹ 11 Common Bench Rep. 153.

² See *Breach v. O'Brien*, 9 Com. B. 227, and the cases there referred to. In *Dawson v. Smith*, 1 L. M. & P. 151, it is said, that a special jury rule does not deprive a party of his right to the common jury process, until a special jury has been struck. And see *Devanag v. Borthwick*, 2 L. M. & P. 277.

* This is construed to be imperative; see *Hooper v. Woolmer*, 10 Com. B. 370; s. c. 1 Eng. Rep. 399, where it was held, that, where the plaintiff has delivered all the demurrer-books, he cannot call upon the defendant to pay for those delivered to the junior puisne judges, as a condition of his being heard, unless he has himself strictly complied with the rule, by delivering the books for the defendant on the day following that on which the defendant should have delivered them.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER;

DURING THE YEAR 1852.

DE ROTHSCHILD and others v. THE ROYAL MAIL STEAM PACKET COMPANY.¹

June 2, 1852.

Bill of Lading, Construction of — Loss by “Robbers” or “Dangers of the Roads.”

The defendants received goods at Panama, to be carried to and delivered in London, “the act of God, the queen’s enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers of whatever nature or kind soever excepted.” The goods were stolen without violence, when in the course of transmission from Southampton to London: —

Held, that this was not a loss within the exception either of “robbers” or “dangers of the roads,” as the word “robbers” meant loss by violence, and “dangers of the roads” meant either dangers of roads where ships lie at anchor, or such dangers on land as more immediately occur on roads, *e. g.* the overturning of the carriages.

THIS was an action against the defendants, for not delivering goods pursuant to the terms of a bill of lading.

The declaration stated, that on the 1st of April, 1851, the plaintiffs caused to be delivered to the defendants, for shipment on board one of their ships, in parts beyond the seas, namely, off Chagres, in South America, eleven boxes of gold dust, of the value of 40,000*l.*, to be carried and conveyed by the defendants (with liberty to transship on board any of their ships), to be delivered within a reasonable time

¹ 21 Law J. Rep. (N. S.) Exch. 273; 7 Exchequer Rep. 734.

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in that behalf, at the Bank of England, in the city of London, (the act of God, the queen's enemies, pirates, robbers, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers, of whatever nature or kind soever excepted), to the plaintiffs or their assigns, he or they paying freight for the same, at the rate of one and three eighths per cent., and the defendants then accepted and received the same accordingly, for the purpose and upon the terms aforesaid. And the plaintiffs have always been ready and willing to accept the said goods at the place and in manner aforesaid, and to pay the said freight for the same; and a reasonable time for the defendants to carry and convey the said goods to, and deliver the same at the place and in manner aforesaid, had elapsed before this suit, and they were not prevented from so doing by the act of God, the queen's enemies, pirates, robbers, &c.; and although the defendants have carried, conveyed, and delivered a part of the said goods, namely, ten boxes of gold dust, yet they have not carried, conveyed, and delivered the residue of the said goods, namely, the other of the said boxes of gold dust, of the value of 3,000*L.*, to the plaintiffs or their assigns, at the place and in manner aforesaid, or in any manner whatsoever, and the same has not been in any manner delivered to the plaintiffs. And that whilst the defendants had the last-mentioned box of gold dust for the purpose aforesaid, they took so little and bad care thereof, that the same then, by reason of the bad and improper care and conduct of the defendants in that behalf, and not by reason of any or either of the said excepted risks, became and was wholly lost to the plaintiffs.

The defendants pleaded, in one plea, that the goods in question were lost by robbers; and in another, that they were lost by the dangers of the roads. Issues thereon.

At the trial, before Pollock, C. B., at the sittings for Middlesex, after Hilary term, it appeared that eleven boxes of gold dust had been received by the defendants at Panama, and the following bill of lading given:—"Received, in good order and well-conditioned, from B. Davidson, Esq., for shipment on board one of the Royal Mail Steam Packet Company's vessels, off Chagres, eleven packages, weighing, gross, 500 cwt. 1 qr. 13 lbs. 14 oz., and said to contain 7,377 oz. 10 dwts., *t. w.*, gold dust, valued 118,040 dollars, being marked and numbered as per margin, and all to be delivered (with liberty to transship on board any other of the company's ships, in like good order and condition,) at the Bank of England (the act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers, of whatever nature or kind soever, excepted), unto Messrs. Rothschild & Sons, of London, or his or their assigns, he or they paying freight at the rate of one and three eighths per cent."

All the boxes were brought across the Isthmus of Panama, and were shipped at Chagres for Southampton, where they arrived in due course; but in the course of their transmission to London, by the railway, one of the boxes was stolen, without violence. The jury found that the defendants were guilty of negligence in the conveyance of them to London, and that this negligence caused the loss.

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Under his lordship's direction, the verdict was entered for the defendants, with liberty to the plaintiffs to move to enter the verdict for them.

A rule *nisi* had, accordingly, been obtained, against which

The Attorney-General (F. Thesiger), Crowder and Needham, now showed cause.¹ The defendants are protected by one or other of the exceptions specified. First, as to the meaning of the word "robbers." It is admitted that the legal meaning of robbery for the purposes of criminal proceedings, is a felonious taking from the person of another, or in his presence, by violence; but, looking at this bill of lading as a commercial contract, and the objects contemplated by it, the word "robbers" cannot be interpreted in its strict sense, but must include any felonious taking. Such goods as these could not be carried about the person so as to be exposed to robbery in this sense, but they would be exposed to the ordinary danger of thieves; and that is the proper construction to be put on the word "robbers." There are many instances in the law where this extended and popular meaning has been given to the word "robber." [They referred to 23 Hen. 8, c. 1, s. 3; 5 & 6 Edw. 6, c. 9; 39 Eliz. c. 15, s. 2; 7 Geo. 2, c. 15; 26 Geo. 3, c. 86; *Sutton v. Mitchell*, 1 Term Rep. 18; *Tomlinson v. Brittlebank*, 4 B. & Ad. 630; s. c. 2 Law J. Rep. (N. S.) K. B. 105; *The King v. Moore*, 1 L. C. C. 335; and *The King v. Mason*, Russ. & R. 419.] But, secondly, the loss was also within the exception of dangers of the road. It has been suggested that roads means sea-roads; but this is not so. It is a term not usually introduced into policies, and is applicable to the peculiar circumstance of this company being carriers by land and water. If roads do not mean roadsteads, neither do the dangers of roads mean only such as arise from imperfect roads, such as precipices, broken arches, &c., but the words, "dangers of the roads," are equivalent to dangerous roads, from whatever cause such danger may arise. In Doctor and Student, Dial. 2, c. 38, the expression is used, "ways that be dangerous for robbing." Loss by robbers has been held to be within the meaning of "perils of the seas." *Pickering v. Barclay*, 2 Rol. Abr. 248; *Barton v. Walliford*, Comb. 56.

Alexander Cockburn, in support of the rule. The loss was not within either of the exceptions. First, as to robbers. It is admitted that the term "robbery" does not always and of necessity imply personal violence. But *prima facie* it does and should be so construed here, for this bill of lading is a legal document, and it must be presumed to have been carefully drawn up. At any rate, it is clear from the context and from the circumstances with reference to which the contract was made, that robbery is used in its technical signification. The defendants are carriers by land and water. On the other side of the Atlantic the country is wild and barbarous, and in crossing the Isthmus of Panama the people conveying the treasure would be liable to the attacks of armed bands of robbers. Against such dangers

¹ April 27, before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

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—such *vis major*—this contract was framed, and not against any petty pilfering which might possibly happen in a peaceable country like this, and in consequence of such culpable negligence as was exhibited in this case. The words are taken from policies of insurance, and in them it has been held that thieves mean public thieves. Com. Dig. “Merchant” (E, g.), Arnould’s Ins. 817, Park’s Insur. 36, 8th ed., Abbott, 345, Jones on Bailments, 43. Secondly, perils of the roads either mean perils incurred in the roadsteads, or such perils as are incidental to the road itself, such as might occur in that rugged country. Perils of the sea mean perils arising from the sea, and not such as are merely perils on the sea, as where a ship was sunk by being fired into by a friendly vessel by mistake. *Cullen v. Butler*, 5 M. & S. 461. (He was then stopped by the court.)

Cur. adv. vult.

Judgment was now delivered by —

POLLOCK, C. B. In this case the plaintiffs sought to recover from the defendants the value of two boxes of gold dust, part of eleven received by them at Panama, to be carried to the Bank of England. The defendants carried the goods from Panama across the Isthmus by land, shipped them at Chagres, and brought them by steam vessels to Southampton, and thence carried them by the London and South-Western Railway to London. The bill of lading was given for them at Panama, acknowledging the receipt of eleven packages, said to contain 7,000 and odd ounces of gold dust to be carried to the Bank of England—“the act of God, the queen’s enemies, robbers, fire, accidents from machinery, boilers, steam, dangers of the sea, roads, and rivers, of whatsoever nature or kind, excepted.” All the packages arrived safely at Southampton, and were placed on the railroad to be carried to London, but one of them was stolen secretly from the railway truck before their arrival there, and the jury found that the defendants were guilty of negligence in the conveyance of them to London, which caused the loss.

The defendants pleaded the exceptions in the bill of lading in two different pleas, one stating that the loss was occasioned by robbers, the other by dangers of the roads. At the trial, both pleas were found for the defendants, but with a reservation of liberty to enter the verdict on both for the plaintiffs. A rule *nisi* having been granted, the case on behalf of the defendants was elaborately and fully argued during the last term. Sir Alexander Cockburn was heard in part for the plaintiffs. Being satisfied that the plaintiffs are entitled to recover, we do not think it necessary to hear any further arguments upon the subject. The question is, whether the theft committed on the South-Western Railway was, first, an act of robbers; secondly, was it a danger of roads within the true meaning of the bill of lading? and we are of opinion that it was neither the one nor the other. It was argued, for the plaintiffs, that the word “robbers” ought not to be construed in the technical sense given to the word by the English law writers, and by some of the English statutes,—the 1 Vict. c. 87, s. 2, for instance, where it means a felonious taking from the person

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in the presence of another, of money, or goods, against his will by force, and putting him in fear; for it was not likely that a robbery in that sense would occur, as the packages were not in the personal presence of the defendants or their servants, and still less were they upon their persons. Other statutes were cited where the meaning is much more comprehensive, and includes the taking without force. Besides, in construing such instruments, it was contended that the ordinary meaning of the words used must be followed. We think that position is correct, but we must also look at the circumstances under which the contract was made, and the peculiar subject to which it applied; and taking these into consideration we cannot doubt that the meaning of the contract was, that the defendants were not to be liable for the loss of the gold dust in instances where it was taken by force by a *vis major* which they, the defendants, could not resist, but that they were to be liable where it was pilfered from them or taken by stealth. It is very unreasonable to suppose that the shippers of a very precious article, of which a large value is comprised in a very small space, which is capable of being easily abstracted by any person employed in carrying it, meant to exempt the persons to whom they gave the custody and care of it from all responsibility for theft committed by their crew, or others, against whom presumably they could guard by the exercise of reasonable care; but it is likely that they should agree to exempt where the goods were taken by a force which they could not resist. The nature of the transaction shows clearly, therefore, that the word "robbers" means, not "thieves," but robbers by force, to whom the term is more usually applied, although in common parlance it is often applied to every description of theft. It is explained also by the word with which it is associated, "pirates," who certainly take by force and not by stealth. We have no doubt, therefore, in this bill of lading that this is the proper meaning of the word "robbers," and this being so, the loss in this case was not by robbers, and that the plea in which the loss was so stated ought to be found for the plaintiffs.

We do not feel any difficulty as to the meaning of the term "dangers of the roads." We think the word "roads" may be explained by the context to mean marine roads in which vessels lie at anchor; or suppose it means roads on land, the dangers of the roads are those which are immediately caused by roads, as the overturning of carriages in rough and precipitous places. The losses by robbers are already provided for under the general term "robbers." The same reason which induces us to believe the parties did not mean the defendants should not be exempted from pilfering by thieves where loss by robbers is excepted, leads us to the conclusion that they did not intend they should be protected in the case of loss by thieves in passing along roads. Our judgment will, therefore, be for the plaintiffs.

*Judgment for the plaintiffs.*¹

¹ In *Marshall v. The Nashville Marine and Fire Insurance Co.*, 1 Humphreys, 99, (Tenn. 1839,) a policy of insurance covered risks "of the rivers, pirates, rovers,

Tambisco v. Pacifico.

TAMBISCO v. PACIFICO.¹

June 1, 1852.

Costs— Security for where Plaintiff a Foreigner.

Security for costs will not be required from a plaintiff who is a foreigner, if he is actually in this country.

[*Oliva v. Johnson*, 5 B. & Ald. 908, overruled. Eds.]

THIS was a rule obtained by the defendant, calling upon the plaintiff to show cause why he should not give security for costs. It was stated in the affidavits, upon which the rule was granted, that the plaintiff was a foreigner usually resident, and that he now resided at Athens, and that he was come over to this country for a temporary purpose only, and not with the intention of taking up his permanent abode here. Against this rule,—

Willes now showed cause.² The affidavit of the plaintiff is an answer to this application. He states that he came over from Athens to this country for the express purpose of bringing this action against the defendant, and that he has been resident here for the last four months; that he fully intends to bring the action to trial, and that he believes he himself will be a witness; and he further states that it is his full intention to remain in this country until judgment is obtained in the action, and that he is unable to give security for costs in consequence of the loss he has sustained by the refusal of the defendant to repay him the advances he has made to him. The practice is settled in this court, that security for costs cannot be required from the plaintiff if he is actually in England, although he usually resides abroad. *Dowling v. Harman*, 6 Mee. & W. 131; s. c. 9 Law J. Rep. (x. s.) Exch. 53. In that case the practice of the Common Pleas, as laid down in Anonymous case, 8 Taunt. 737, was followed.

thieves, &c." The goods insured were "stolen by thieves on board the boat employed in the transportation of the goods, but not persons connected with the boat." It was held the loss was not within the policy; that the theft insured against was one accompanied by *violence*, and expressed by the word *latrocinium*, robbery, and not *furtum*, a theft committed quietly and secretly. See also 3 Kent's Com. p. 303. 2 Arnould on Ins. p. 818.

On the other hand a more reasonable construction seems to have been adopted in *The Atlantic Ins. Co. v. Storrow*, 5 Paige, 285, (N. Y. 1835,) where Chancel-

lor Walworth held, that under a policy of insurance upon goods, against loss by thieves, the underwriters are liable for a loss by thieves who are in no way connected with the ship, whether the robbery is by simple larceny or by open violence, and although the carrier might also be liable. And this was approved in a subsequent case, *American Ins. Co. v. Bryan*, 1 Hill, 25. (N. Y. 1841,) where it was also held to be immaterial whether such theft was by any of the crew or others. The word "thieves" is not limited to *external* or *assailing* thieves; s. c. 26 Wendell, 563.

¹ 21 Law J. Rep. (N. S.) Exch. 276.

² Before POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

T. Jones, in support of the rule. The cases cited are contrary to what was decided in *Oliva v. Johnson*, 5 B. & Ald. 908, where the plaintiff was compelled to give security for costs, because it was not shown that he intended to continue to reside in this country. So also in *Gurney v. Key*, 3 Dowl. P. C. 559, it was held by Williams, J., that if a plaintiff permanently reside abroad and is only occasionally in this country, security may be required. *Naylor v. Joseph*, 10 J. B. Moore, 522; s. c. 3 Law J. Rep. (N. S.) C. P. 207, is to the same effect. This is reasonable, because the plaintiff has no right to bring an action, and put the defendant to costs, and retain the power of going away at any moment, and avoid the consequences of his vexatious conduct.

[*ALDERSON, B.* The defendant is in a worse position, because he can be stopped at any moment.]

POLLOCK, C. B. I am of opinion that the rule ought to be discharged, as it was decided in 1840, by this court, that the practice is not to require security for costs from a foreigner being plaintiff if he is here in England. Nor is it so unreasonable as is contended, for if it were otherwise, our courts would be shut against every foreigner, unless he could find security for costs. However, without discussing the reasons, I am disposed to adhere to the judgment of this court in *Dowling v. Harman*, and it is more in accordance with the older cases.

ALDERSON, B. The question comes to this, whether the plaintiff must state that he resides here, and intends to continue to reside here. But even if he should state this, it would be of little value, as he might at any time change his intention. I think the simple rule should be that the statement that he is resident here ought to be sufficient.

PLATT, B. I always thought it clear and plain that it is only where the plaintiff is not within the jurisdiction that security for costs can be required.

MARTIN, B. The rule is plainly laid down in *Dowling v. Harman*, and although *Oliva v. Johnson* was not there cited, yet it is to be observed that my brother Parke was counsel in that case, and it was not likely to have been forgotten by him, for we all know how exact and retentive his memory is in these matters.

Rule discharged.

CANNAN and others, assignees of NASH, a bankrupt, v. THE SOUTH-EASTERN RAILWAY COMPANY.¹

May 7, 1852.

Trover — Notice of Act of Bankruptcy — 6 Geo. 4, c. 16, s. 84 — Fiat in Bankruptcy — Variance — Right of Assignees to sue.

A bankrupt, previously to his bankruptcy, deposited timber with the defendants, who were wharfingers, to be kept at their wharf, and delivered on payment of the wharfage. On the 7th of February, 1848, a fiat issued against him, and the plaintiff, Cannan, was appointed official assignee. The bankrupt, after the fiat, sold the timber, and between September, 1848, and January, 1849, it was delivered to the purchaser by the defendants, who had no notice of the bankruptcy. In February, 1849, the other plaintiffs were appointed trade assignees.

In trover by the official and other assignees, held, first, that the defendants were not liable for the value of the timber, being protected by the 6 Geo. 4, c. 16, s. 84. Secondly, that the issuing of the fiat was not notice to all the world of its issuing, the fiat not standing on the same footing as the old commission of bankruptcy.

The words in the 84th section "goods belonging to any bankrupt," mean goods which belonged to the bankrupt at the time they were deposited in the possession or custody of the person delivering them, and which would have continued to be his property unless an act of bankruptcy had occurred.

Quære, whether there was a variance between the declaration and the facts stated, on the ground that the official assignee was to be considered as alone possessed of the timber at the time of the conversion and not the trade assignees.

TROVER to recover the value of a quantity of timber deposited with the defendants. The declaration alleged that the plaintiffs (the official assignee and the trade assignees) were possessed of the timber as assignees of John Nash, a bankrupt.

Pleas — not guilty and not possessed.

The facts were by consent stated for the opinion of the court in a special case, as follows.

CASE. The defendants were owners of a wharf, and the bankrupt, before the date of the fiat (which it must be understood was before the act of bankruptcy), deposited the timber with them, to be kept at the wharf, and delivered on payment of the wharfage. On the 7th of February, 1848, a fiat in bankruptcy issued against Nash, and he was adjudged a bankrupt, and the plaintiff Cannan appointed official assignee. On the 13th of February, 1849, the adjudication was for the first time notified in the Gazette, and the other plaintiffs were afterwards appointed trade assignees. After the issuing of the fiat, the bankrupt, without the consent or knowledge of the official assignee, sold the timber, and between the 11th of September, 1848, and the 15th of January, 1849, it was delivered by the defendants to the purchasers, on a delivery order given by the bankrupt to them. The defendants had no notice of the fiat or adjudication, nor, as it must be understood, of the act of bankruptcy. The question for the opinion

¹ 21 Law J. Rep. (N. S.) Exch. 257.

of the court was, whether the plaintiffs were entitled to recover the value of the timber from the defendants.

The case was argued by

Willes, for the plaintiffs (April 26). The whole of the assignees are properly joined, and the conversion is well alleged to have been of their goods, notwithstanding the official assignee was alone appointed at the time. Their title relates back to the act of bankruptcy. It is clear that had the conversion taken place before the appointment of any assignees they might have joined, and to hold that they cannot in the present case, must be productive of one of two consequences; either the court must hold that the title of the creditors' assignees was intermittent, existing prior to the appointment of the official assignees, being divested by their appointment, and again attaching upon their own appointment; or the old doctrine of relation must be obliterated. *Cooper v. Chitty*, 1 Burr. 20, shows that it is no answer to say, that to apply the doctrine of relation would be productive of harsh consequences. That the title of the assignees relates back to the act of bankruptcy, is supported by the construction of all the old bankruptcy laws.

[*PARKE, B.* If at the time of the wrong done there was an assignee to whom the wrong was done, the question is, whether on the appointment of a subsequent assignee his right is so transferred so as to make it a wrong done to such new assignee.]

It is so transferred. The 13 Eliz. c. 7, originated the doctrine of relation. 1 Christian's Bankrupt Laws, 11. The title of the provisional assignee related back, and when the official assignee was substituted by statute he was invested with similar rights. The 6 Geo. 4, c. 16, s. 45, providing for the appointment of the provisional assignee, directs that on his removal he shall deliver up and assign the estate of the bankrupt to the creditors' assignees, and that "all the estate of the bankrupt which shall be so delivered up and assigned shall be as effectually and legally vested in the assignees so chosen as aforesaid as if the first assignment had been made to them by the commissioners." Now, it is unnecessary that there should be any formal assignment, and the creditors' assignees are to be possessed jointly with the official assignee — 1 & 2 Will. 4, c. 56, s. 22; but that does not, nor does the fact that by that section the official assignee alone is to receive the property, affect the title of the assignees. The 5 & 6 Vict. c. 122, under the 48th section of which the assignees in the present case were appointed, by section 51, enacts, "That every official assignee of any bankrupt's estate appointed under the provisions of this act shall have the same rights, powers, privileges and exemptions as are possessed by official assignees appointed under the said recited act 1 & 2 Will. 4, c. 56, and the enactments therein contained," and section 53 empowers newly appointed official assignees to act jointly with existing assignees, and provides that "all the real and personal estate of the bankrupt under such fiat shall immediately on such appointment vest in such official assignee jointly with the existing assignees." The 1 & 2 Will. 4, c. 56, s. 25, does away with

Cannan v. The South-Eastern Railway Company.

the necessity of assignment, and gives their appointment the operation of vesting the property in them. The 6 Geo. 4, c. 16, ss. 45 and 64, gave the creditors' assignees all the rights of the provisional assignees; and the same rights by 1 & 2 Will. 4, c. 56, s. 25, apply to the creditors' assignees with respect to the official assignees. The only conclusion is, that the property is vested in the whole of the assignees from the act of bankruptcy; then, the right relates back, and makes the wrongful act with respect to the property a wrongful act done to their property.

[MARTIN, B. If, after an act of bankruptcy, and before the appointment of assignees, a pint of wine of the bankrupt were drunk by one who had no right, how should you declare?]

Suppose the assignees brought that action, then it would be said that, inasmuch as the bankrupt was then possessed of the property, and it was not then assigned by the appointment of assignees, it would be necessary to declare that the goods were the property of the assignees, and that they were converted while the bankrupt was possessed.

[POLLOCK, C. B. If the property were destroyed it could not be delivered up.]

But the statute relates to rights of action, and vests the right of action. Secondly, there was a conversion. Although persons doing an act in performance of a public duty may be protected in some cases, and although the company obtained possession of the goods as wharfingers, and under a contract, yet being incorporated under an act of parliament for a special purpose, they could not enter into a contract which they were not empowered to enter into. *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 21 Law J. Rep. (N. S.) C. P. 23; s. c. 7 Eng. Rep. 505; *Wyld v. Pickford*, 8 Mee. & W. 443; s. c. 10 Law J. Rep. (N. S.) Exch. 382, and *Youl v. Harbottle*, Peake N. P. 49.

[MARTIN, B. If the bankrupt gave a lawful authority to the carriers to deliver to a certain person, the assignees would take subject to it.

PARKE, B. Selling by a man who has no right to sell is surely a conversion.]

Here, the bankrupt had no right. The statute 6 Geo. 4, c. 16, s. 84, must mean effects of which the bankrupt was possessed at the time of the delivery.

Hoggins, contra. The plaintiffs allege that at the time of the conversion they were possessed, while, in fact, one of them, the official assignee, was alone possessed; and it ought to have been so alleged. This case is analogous to that of executors, who, if they sue for an injury to a part of the estate committed while former executors were possessed of it, must so aver it. The 1 & 2 Will. 4, c. 56, s. 25, merely does away with the necessity of an assignment by deed, it does not put the assignees in the same position with the provisional assignees. The 22d section of that act says, in the most emphatic words, that the estate shall vest in the official assignee.

[POLLOCK, C. B. The creditors' assignees take all the rights of action.]

Yes; but they must lay the property in the right person in pleading. Secondly, there has been no conversion by the company; they were at the time of the conversion the owners of a wharf called the "Canal Wharf," and they got the goods to be kept on the wharf, and delivered up on payment of wharfage. The goods were, therefore, in their possession under a contract, and they could be guilty of no conversion while acting according to the instructions of the person with whom the contract was entered into. *Townsend v. Inglis*, Holt's N. P. 278. Thirdly, the defendants had no notice of any act of bankruptcy, nor of the issuing of the fiat; those facts are found by the case. A fiat is issued, and for more than twelve months no notice is given to the public.

[POLLOCK, C. B. It may well be that the delivery back to a man of that which he had in some degree parted with might be protected by the legislature, and that is the construction of the 84th section of the 6 Geo. 4, c. 16, taken in connection with the 82d.]

This is similar in principle to the case of a tenant who has paid his rent, without notice of assignment, to his former landlord; in that case the payment so made is good against the assignee. *Watts v. Ognell*, Cro. Jac. 192. No action could be maintained against the vendee. *Kynaston v. Crouch*, 14 Mee. & W. 266; s. c. 14 Law J. Rep. (N. S.) Exch. 324, and that is a test. Notice of a docket being struck is no notice of a prior act of bankruptcy. Notice of an act of bankruptcy means knowledge or wilfully abstaining from acquiring knowledge. *Bird v. Bass*, 6 Man. & G. 143. *Knowles v. Horsfall*, 5 B. & Ald. 134, shows the effect of want of notice. The difficulty raised on the 6 Geo. 4, c. 16, s. 84, was the expression, "the property of any bankrupt."

[POLLOCK, C. B. To construe that strictly would make the provision nugatory.]

Willes, in reply. To protect the company from this action would be a most dangerous extension of the doctrine of estoppel by standing by. The assignees were entitled to the goods when they were delivered by the company to the person to whom they were directed to deliver them. *Oakley v. Davis*, 16 East, 82. In every case the hardship of a man being made liable for the disposal of property where he has acted innocently without notice will not be regarded. The cases upon the subject apply only where a person transfers property to innocent purchasers. *Knowles v. Horsfall* is inapplicable; that case relates to goods appearing to be the property of the bankrupt. The 84th section of the 6 Geo. 4, c. 16, applies only to transfers before the assignees are appointed. So the 2 & 3 Vict. c. 29, has been held to apply only to cases of fiats before the commission, when no assignees have been appointed. *Moon v. Phillips*, 9 Dowl. P. C. 294.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. His lordship stated the facts as above set forth, and proceeded,— For the plaintiffs it was argued, that by the operation of the bankrupt laws in force at the time when the transaction took place the property in the timber vested in all the assignees, by relation, from the time of the act of bankruptcy, and that the delivery by the defendants to the purchaser from the bankrupt was a conversion of the property. The cases of *Cooper v. Chitty*, *Balme v. Hutton*, 9 Bing. 471; s. c. 2 Law J. Rep. (N. S.) Exch. 116, and *Carlisle v. Garland*, 7 Bing. 298; s. c. 9 Law J. Rep. C. P. 96, were cited, which conclusively show that from the time of the act of bankruptcy the goods of the bankrupt cease to be his and become the property of his assignees, who may maintain an action of trover against the sheriff who issues a writ of *feri facias* against the bankrupt, subject, of course, to the various limitations created by the enactments of the various statutes on this subject.

Three points were made for the defendants; first, that they were protected by the 84th section of the Bankrupt Act, the 6 Geo. 4, c. 16; secondly, that the delivery of the timber was in conformity with the contract on which it was deposited with them, and without notice of any change in the property for title to the timber, and was not a conversion, and they were excused from any action by reason of such delivery; thirdly, that there was a variance between the declaration and the facts stated, for that the official assignee alone was possessed of the timber at the time of the conversion (that is, the delivery to the purchaser), and that the averment that all the assignees were then possessed was not made out, and that the defendants were entitled to the judgment of the court on the issue of the plea of not possessed. There is no doubt whatever of the truth of the position advanced on behalf of the plaintiffs. As a general proposition, the title of the assignees to the goods has relation back to the act of bankruptcy; and, notwithstanding the great extent to which the application of this rule has been cut down and restricted by modern enactments, it still remains a fundamental rule and principle of the bankrupt laws. Note to *Cooper v. Chitty* and *Kynaston v. Crouch*. But, we think the defendants are protected by the operation of the 84th section of the Bankrupt Act, 6 Geo. 4, c. 16, which section enacts that no person or body corporate, or public company, having in his or their possession or custody any money, goods, wares, or merchandise, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt, or his order (not stating before the date of the commission), provided he or they had not at the time of the delivery notice of the act of bankruptcy committed.

It was argued that the operation of this section was restricted to delivery before the issuing of the commission (that is now the fiat), until which time the goods might more properly be said to belong to the bankrupt. But we do not think that this is the proper construction of the section. In truth, the goods might in some sense be said to belong to the bankrupt up to the time of the appointment of

the assignees. But in our opinion the words "goods belonging to the bankrupt" mean goods which belonged to the bankrupt at the time they are deposited in the possession or custody of the person or body corporate, or public company, delivering them, and which would have continued to be his property unless an act of bankruptcy had occurred. That section was meant by the legislature to protect wharfingers, warehousemen, or dock companies, and other parties whose trade it is to hold possession of other men's property for their convenience, which is the character the defendants filled in the present transaction.

It was argued, on behalf of the plaintiffs, that their view was proved to be correct by reason of the preceding section of the statute. This is an error. The 84th section is a perfectly independent section, and has nothing whatsoever to do with the preceding one. It is taken from, and intended to be, a substitute for the 56 Geo. 3, c. 151, which consists of two sections, and, in substance, contains what is contained in the 84th section of the 6 Geo. 4, c. 16, which consolidated all the existing bankrupt laws; and it seems to be perfectly clear that the 56 Geo. 3, c. 137, which was to extend a provision of the 1 Jac. 1, c. 15, s. 4, namely, that no debtor of a bankrupt should be endangered by the payment of his debt to the bankrupt (which must be understood to mean before he has become bankrupt), was meant to protect the wharfinger or dock company who delivered the goods to, or the order of a person from whom they were received, before they had knowledge that such person had become bankrupt. We are, therefore, of opinion that the defendants are protected by the operation of the 84th section. But it was contended, for the plaintiffs, that the issuing of the fiat was, *ipso facto*, notice to all the world of its issuing. If it had been a commission it would have been such notice according to the case of *Collet v. De Gols and Ward*, Cas. temp. Talbot, 45, and after such a notice there might be a difficulty in saying the defendants would be excused under the 84th section. But we think that a fiat is not on the same footing as the old commission of bankruptcy was. At the time when this bankruptcy took place the statute 1 & 2 Will. 4, c. 46, was in force, and by the 12th section, in lieu of a commission, a fiat issued under the hands of the Chancellor or Master of the Rolls, or other judge or Master of the Court of Chancery, which was afterwards entered of record in the Court of Bankruptcy. In our opinion that was not a proceeding of the same public notoriety, certainly not until it was entered of record as the issuing of the commission under the great seal, and does not itself operate as a notice; and we certainly think, unless compelled by authority, we ought to hold notice of an act to be knowledge of it brought home to the mind of the person to be affected by it. This being our opinion, it is unnecessary to consider the other two points raised on behalf of the defendants. The judgment of the court, in pursuance of the authority given to us by the special case, is, that a *nolle prosequi* be entered.

Judgment accordingly.

CARR v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.¹

May 8, 1852.

Carriers by Railway — Limitation of Liability — Notice — Construction of Contract.

The plaintiff being the owner of a horse delivered it to the defendants, a railway company, to be carried on their railway, subject to conditions which stated that the owners undertook all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling on the railway. The horse having been injured by the horsebox being propelled against some trucks through the gross negligence of the company:—

Held, hesitante Platt, B., that the company, under the terms of the contract, were not responsible for the injury.

Quære, whether the company would have been responsible if the horse had been stolen.

CASE. The declaration stated that the defendants were the owners of the Lancashire and Yorkshire Railway, and were possessed of engines, horseboxes, &c., for conveying passengers, horses, cattle, &c., on the railway as common-carriers; that the plaintiff delivered to the defendants a horse to be carried by them for hire in a horsebox, on the railway from Wakefield to Knottingley, subject to certain conditions, assented to by the plaintiff and contained in a notice at the foot of the ticket or waybill of the railway company, for the conveyance of the horse, and which was in these words—"This ticket is issued subject to the owners undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description, travelling upon the Lancashire or Yorkshire Railway, or in their vehicles." That whilst the horse was in the custody of the defendants, and through the improper conduct and gross negligence, and from the want of proper care, skill and diligence on the part of the defendants, the horsebox was propelled on the railway against certain trucks, with so great violence that the horse was seriously damaged, and died in consequence thereof.

Plea — Not guilty.

At the trial, before Alderson, B., at the last York spring assizes, the jury found that the defendants had been guilty of gross negligence, and returned a verdict for the plaintiff, damages 87*l*. In the term following, the defendants having obtained a rule *nisi* to arrest the judgment,

Atherton and *Cowling* showed cause. The defendants received this horse as common-carriers, and although it may be that they might have declined to carry it, yet as they did not do so, the general liabilities and duties at common law attach, and they cannot relieve them-

¹ 21 Law J. Rep. (N. S.) Exch. 261.

selves by any such notice as that set out in the declaration, The law imposes two things upon common-carriers; first, the liability of being insurers, irrespective of all question as to fulfilment or neglect of duty, and secondly, the duty of exercising reasonable care, or at least of avoiding gross negligence. The liability may be got rid of for a good consideration, but the duty cannot be avoided except by authority of law. Thus, the notices in use prior to the Carriers Act, did not relieve the carrier from the obligation of reasonable care. If the meaning of this agreement is, that gross negligence is not to render the defendants liable, such agreement is not legally binding.

[PARKE, B. If that argument be correct, the plaintiff should have tendered a reasonable compensation, and refused to have entered into the special contract. The defendants imposed terms and the plaintiff assented to them.]

If, however, this point is not now open, it is submitted that the reasonable construction of the notice is, that the defendants are not to be exempted from the consequences of their own gross negligence. The notice only exempts them from unforeseen accidents. Upon the point *Wyld v. Pickford*, 8 Mee. & W. 443; s. c. 10 Law J. Rep. (N. S.) Exch. 382; *Beck v. Evans*, 16 East, 244; *Riley v. Horne*, 5 Bing. 217; s. c. 7 Law J. Rep. C. P. 32; *Bodenham v. Bennett*, 4 Price, 31; *Ellis v. Turner*, 8 Term Rep. 431; *Garnett v. Willan*, 5 B. & Ald. 53; *Sleat v. Fagg*, 5 B. & Ald. 342; Story on Bailments, p. 365, s. 571, a, and *Stuart v. Crawley*, 2 Stark. 323, are applicable. If the full literal meaning be given to the words of this notice, even then the company would not be liable for the wilful misfeasance of their servants. The very object of the sender of the horses being that they should be safely carried, this would be defeated by an unlimited exemption being enjoyed by the company under this notice. It is an agreement of a personal character, and rather than the very object of the contract should be defeated, the repugnant proviso may be rejected altogether. *Furnivall v. Coombs*, 5 Man. & G. 736; s. c. 12 Law J. Rep. (N. S.) C. P. 265. The special contract referred to in the 6th section of the Carriers Act (1 Will. 4, c. 68), must mean a binding contract, for which there is a consideration; here there is none. They referred to *Shaw v. The York and North Midland Railway Company*, 18 Law J. Rep. (N. S.) Q. B. 181; *Chippendale v. The Lancashire and Yorkshire Railway Company*, 21 Law J. Rep. (N. S.) Q. B. 22; s. c. 7 Eng. Rep. 395.

Wilkins, Serg., and *Tomlinson*, in support of the rule, were not called upon.

PARKE, B. The question in this case turns upon the notice which was given by the defendants, and which forms the foundation of the contract between the parties. It is plain that since the passing of the Carriers Act, it is competent for carriers to make a special contract. Such a contract was made in this case, and the only question is as to the meaning of that contract. According to the old cases, there was this limitation upon the construction of carriers' notices,

that unless a carrier excluded his liability in express terms, according to the ordinary terms of the notice, he would be responsible for gross negligence. The practice of a carrier protecting himself by notice, was put an end to by the Carriers Act. Now, whether in the present case the defendants are liable in their character of common-carriers, that is, that they are bound to carry safely and securely, and are only protected from that description of loss which arises from the act of God and the king's enemies, and the like, is a question that we need not discuss now. If the plaintiff had meant to make the defendants liable as common-carriers, the course for him to take was to tender them the price for the carriage of the goods, and on their refusal to carry, to bring an action against them for not carrying. Whether the plaintiff would have succeeded in that action we need not say. The duty of a common-carrier binds him to carry those goods only which according to his public profession he is bound to do. That is established by the case of *Johnson v. The Midland Railway Company*, 4 Exch. Rep. 367; s. c. 18 Law J. Rep. (N. S.) Exch. 366. But with the defendants in that character we have nothing to do, because this was the case of a special contract, and we have nothing to do but to inquire into the meaning of it.

Prior to the establishment of railways, the court were in the habit of construing contracts between individuals and carriers, much to the disadvantage of the latter. Before railways were in use the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried upon railways, and horses which were used to draw vehicles are now themselves the objects of conveyance. Contracts, therefore, are now made with reference to the new state of things, and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger; the rapid motion, the noise of the engine, and various other matters are apt to alarm them and to cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss by making special contracts. The question is, whether they have done so here.

The jury have found that the defendants have been guilty of gross negligence, and that must be taken as a fact. In my opinion the owner of the horse has taken upon himself the risk of conveyance, the railway company being bound merely to find carriages and propelling power; the terms of the contract appear to me to show this. The company say they will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description, travelling upon their railway. This, then, is a contract by virtue of which the plaintiff is to stand the risk of accident or injury, and certainly, when we look at the nature of the things conveyed, there is nothing unreasonable in the arrangement. In the case of *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company*, 20 Law J. Rep. (N. S.) Q. B. 440; s. c. 5 Eng. Rep. 329, the language of the contract was different from the present, but not to any great extent.

[His lordship stated the case.] In that case, the accident was occasioned by the wheels not being properly greased; in the present case, the carriage that contained the plaintiff's horse was driven against another carriage. We ought not to fritter away the meaning of contracts merely for the purpose of making men careful. That is a matter that we are not bound to correct. The legislature may, if they please, put a stop to contracts of this kind, but we have nothing to do with them except to interpret them when they are made.

ALDERSON, B. The defendants in this case undertook to carry the goods in question on certain terms. The question then is, what are those terms? It is clear that they are such as the defendants might lawfully make. It is plain to me that they undertook to carry the horse at the risk of the plaintiff. The words are "the owners undertaking all risk of conveyance whatsoever." Now, under those terms a question might be raised whether the injury contemplated was such as must issue in injury to the thing conveyed; so that a doubt might arise whether the case of the horse being stolen was contemplated, as under such circumstances the accident would not issue in damage to the horse. But that question would not arise here, as in this case the horse itself has been injured. The result is, that if there has been gross negligence on the part of the defendants they are protected against liability by virtue of the words of the contract.

PLATT, B. The declaration states that the defendants were guilty of gross negligence, and that fact was proved. The *gravamen* of the charge is the gross negligence. [His lordship read the notice.] Now, undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly, horses were seldom carried, but now they are ordinarily conveyed by the trains. It is, therefore, said that new stipulations are necessary to guard carriers from the risks which are incidental to this new mode of conveyance. It is suggested that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes, and that unless we take upon ourselves the office of legislation, this ticket absolves the carriers from all responsibility. I own I am startled at such a proposition, and considering the high authority by which it is supported, I feel I ought to doubt and to distrust my own opinion. But I am bound to say that I am not satisfied that the language of this ticket absolves the railway company from all liability for damage. I cannot help thinking that the owner of the goods never dreamed of such a thing when he signed this contract. In truth, this accident had nothing to do with the conveyance of the horse. The accidents referred to are those which occur whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by this contract.

MARTIN, B. I agree in opinion with my brothers Parke and Alderson. This is the case of a special contract, which the plaintiff has adopted and assented to. Without doubt, at common law, a carrier

is entitled to make a special contract. If, indeed, he refuses to carry goods, except on the terms of a special contract, he is liable to an action; but if he makes a special contract it must be abided by. The Carriers Act says that a special contract may be made. It is, then, our duty to see what contract the parties have made. Insurers are answerable for gross negligence, and if goods may be insured others may contract that they will not be answerable for their own gross negligence. In this case, the language used by the parties cannot be stronger than it is. I am unable to say what was passing in the mind of the owner of the horse. I am to look only at the terms of the notice, and if the carrier had been desirous of preparing a contract by which he would get rid of his liability in respect of gross negligence, he could not have used more apt words than those that are contained in this notice. With respect to the argument of inconvenience, the answer is, that we have nothing to do except to carry out this contract, the parties concerned and not ourselves are to judge of the inconvenience. If we hold the carriers in this case responsible for gross negligence, we shall place them in the situation of insurers and underwriters. There are, indeed, inconveniences attending either mode of construing the contract, but, in my opinion, the defendants are not answerable under this contract for any risk arising from gross negligence.

*Rule absolute.*¹

¹ The doctrine that common-carriers may by an actual express contract, limit their common law liability is now too well settled in America to be disturbed. See *Austin v. The Manchester, Sheffield, and Lincolnshire Railroad Company*, 11 Eng. Rep. 506, and editor's note. In addition to the authorities there cited, the reader is referred to the late case of *Dorr v. The New Jersey Steam Navigation Company*, 4 Sanford, R. 136 (1850), where the case of *Gould v. Hill*, 2 Hill, to the contrary, is denied to be sound. *Fish v. Chapman*, 2 Kelly, 349, (1847,) however, strongly supports those views. The American authorities have not, however, been disposed to interpret such special contracts as shielding the carrier from the results of his gross negligence. Thus in *Reno v. Hogan*, 12 B. Monroe, 63 (1851), the carriers received a box of glass, with a clause in the bill of lading, that they should not be "accountable for breakage." On its arrival at the place of destination, the glass was found broken into small fragments, which was proved to have been caused by the gross negligence of the defendant or his servants. The court, while admitting the existence of the special contract, held that its provisions did not apply to injuries arising from gross negligence. The Eng-

lish cases also, which have held that a special contract was created by the publication of a notice of exemption by the carrier, brought home to the forwarder, have often declared that, notwithstanding such special contract, the carrier was liable for gross negligence. *Beck v. Evans*, 16 East, 244 (1812), illustrates this. The plaintiffs sent a cask of brandy by the defendants. The brandy mostly leaked out on the passage, through the gross negligence of the defendants' servants. The chief ground of defence was the publication of a notice that "the defendants would not be answerable for any goods, above 5*l.* in value, if lost, stolen, or damaged," unless a special agreement was made, &c. The court allowing the validity of the notice, and that it created a special contract between the parties, nevertheless held the carrier liable; Lord Ellenborough saying, "I think the carrier does not stipulate for exemption from the consequences of his own misfeasance. If goods, confided to him, are damaged by his own misfeasance, his notice will not protect him." And the plaintiff had judgment. *Smith v. Horne*, 8 Taunton, 144 (1818), is to the same effect.

Bodenham v. Bennett, 4 Price, 31 (1817), in the exchequer, adopts the same doc-

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BLUCK v. GOMPERTZ.¹

June 7, 1852.

Guaranty — Correcting Mistake after Signature — Frauds, Statute of.

A. having agreed to sell to B. two parcels of goods, before they were delivered, B. procured from C. a letter as follows:—"Upon your handing me your two drafts upon B. respectively for 200*l.* and 146*l.* at two months from this date, I undertake to get them accepted by B., and to see them paid." This was signed by C. The goods were then delivered, but B. a few days afterwards discovered that the goods charged 146*l.* should have been charged 150*l.*, and drew two bills accordingly for 200*l.* and 150*l.* respectively, which C. procured B. to accept, and C. then wrote across the guaranty the following words:—"I have received the two drafts, one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.* both accepted by B." Under this the plaintiff signed his own name:—

Held, that this was rightly described as an undertaking by C. to see the two bills of 200*l.* and

trine, and Wood, Baron, said "these special conditions were introduced for the purpose of exempting carriers from *extraordinary events*; but they were not meant to exempt them from due and ordinary care."

These were followed by *Birkett v. Willan*, 2 Barnewall & Alderson, 356 (1819,) in the King's Bench. There the notice was, the "proprietors will not be answerable for any package of more than 5*l.* value, if *lost or damaged*, unless the same be specified, and insurance paid, over and above the common carriage." This was not done. The notice was therefore valid. A special contract was therefore created; the goods were misdelivered, through gross negligence of the defendant. *Held*, he was liable notwithstanding his notice.

Batson v. Donovan, 4 Barnewall & Alderson, 21 (1820,) is a strong case to the same point. Best, J., said "These notices do not affect the carriers' responsibility as to negligence or misfeasance." See also *Garnett v. Willan*, 5 Barnewall & Alderson, 53, (1821); *Sleat v. Fagg*, Id. 542; *Wright v. Snell*, Id. 350; *Duff v. Budd*, 3 Broderip & Bingham, 177, (1822); *Brooke v. Pickwick*, 4 Bingham, 218 (1827.)

Perhaps the case of *Wyld v. Pickford*, 8 Meeson & Welsby, 443 (1841), is as strong a case as can be found on this subject. There the notice was in the same general terms as before stated. One point elaborately argued was, whether such a special notice operated as a special contract, or as some act done by the carrier, not amounting to a contract, whereby he relieves him-

self from his liability. The court considered that receiving the goods after notice given to the plaintiff, that the carriers would not be liable except on certain conditions, *ipso facto*, created a special contract between the parties, but that such special contract did not exempt the carrier from the exercise of ordinary care in the carriage of the goods. But see *Hinton v. Debbin*, 2 Q. B. Rep. 646, (1842); *Owen v. Burnett*, 4 Tyrwhitt, 143, (1834.)

In America, the weight of authority seems strongly inclined against construing such special contracts as exempting the carrier from the results of his gross negligence. Opinions and *dicta* to this effect may be found in *Dorr v. The New Steam Navigation Company*, 4 Sanford, R. 136, (1850); *Laing v. Colder*, 8 Barr, 479, (1848); *New Jersey Steam Navigation Company v. Merchants Bank*, 6 Howard, U. S. R. 344, (1848); *Slocum v. Fairchild*, 7 Hill, 292, (1843); *Swindler v. Hilliard*, 2 Richardson, 286, (1847.) 15 Law rep. 335.

The question, after all, seems to be one of construction. A contract may contain such terms as necessarily to exonerate the carrier, if the goods be lost, or destroyed by *any cause*, whether by the carriers' negligence, fraud, or even theft; but it would seem, that courts would hesitate to put such a construction upon any contract, unless absolutely required so to do by its express terms. It might be fairly concluded that loss from such sources was not within the intention of both parties when the contract was made, and the intention is the polar star in construing any contract.

¹ 21 Law J. Rep. (N. S.) Exch. 278.

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150*l.* respectively paid by B., and that it was sufficiently signed within the Statute of Frauds.

ASSUMPSIT upon a guaranty. The declaration stated that, before the making of the promise by the defendant hereinafter mentioned, to wit, &c., one M. J. O'Connell, by the defendant as his agent, bargained and agreed with the plaintiff to buy of him, and the plaintiff bargained and agreed with the said M. J. O'Connell to sell to him, divers goods and chattels, to wit, ten hogsheads of wine, for divers prices or sums of money, to wit, 200*l.* and 150*l.*, and, thereupon, to wit, &c., in consideration that the plaintiff, at the request of the defendant, would, at his own costs, obtain two papers respectively stamped with a stamp denoting the payment, for the use of her Majesty, of the duty payable by law in respect of the bills of exchange to be made thereon respectively as hereinafter mentioned, and would, on the said papers, respectively make his two bills of exchange in writing, and direct the same to the said M. J. O'Connell, and thereby respectively require him, six months after the date thereof, respectively to pay to the plaintiff the said prices or sums respectively, and would deliver the said bills of exchange to the defendant, the defendant promised the plaintiff to get the said bills of exchange accepted by the said M. J. O'Connell, and to see that they were duly paid. The declaration then averred that the plaintiff procured the two bills of exchange, the one for 200*l.*, and the other for 150*l.*, and delivered them to the defendant, but that although he got them accepted by the said M. J. O'Connell, and they were afterwards duly presented, the said bills were not paid when due. To the plaintiff's damage, &c.

Pleas — *Non assumpsit*, and traverses of the making and delivery of the bills to the defendant.

At the trial, before Pollock, C. B., at the sittings for Middlesex, after Michaelmas term, 1851, it appeared that M. J. O'Connell had agreed to buy of the plaintiff two parcels of wine, one of the value of 200*l.* and the other, as was supposed, of the value of 146*l.*, and that the defendant had given the following guaranty to the plaintiff: —

“ Kensington, March 19, 1851.

“ Dear Sir, — Upon your handing me your two drafts upon M. J. O'Connell, Esq., M. P., respectively for 200*l.*, and 146*l.*, at six months from this date, I undertake to get them accepted by him, and to see that they are duly paid.

“ (Signed,) H. GOMPERTZ.

“ To James Bluck, Esq.”

Subsequently, on the 29th of March, Mr. Bluck went up to Mr. Gompertz's house at Kensington, and obtained the bills accepted by M. J. O'Connell, and Gompertz, the defendant, then himself wrote across the guaranty a receipt for them in the following words — “ I have received the two drafts, (one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*,) both accepted by Mr. O'Connell.” This receipt so written across the guaranty was then

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signed by the plaintiff. Upon this document being put in, it was objected that this was a guaranty within the Statute of Frauds, and that it was not sufficiently signed. His lordship overruled the objection and a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

A rule *nisi* was accordingly obtained, against which

Welsby and *R. Pearce* showed cause.¹ It is not an undertaking within the statute at all, but an original agreement for the consideration that the plaintiff will obtain the stamps for the bills of exchange. There was no existing debt, and the apparent inadequacy of the consideration is no objection, for that is immaterial provided there is a consideration. *Simpson v. Penton*, 2 Cr. & M. 430; s. c. 3 Law J. Rep. (N. S.) Exch. 126.

[PARKE, B. This is a collateral undertaking.]

If so, there is a sufficient memorandum signed by the person to be charged therewith, or by some person lawfully authorized by him, as required by the statute. The alteration from 146*l.* to 150*l.*, is merely to show the meaning of the parties that the value of the wine, whatever it was, was to be secured by these bills. The document when corrected is to be read as of the date when it was made. At any rate the consideration was divisible; and if the guaranty is not good for both bills, it is for the 200*l.*, and the plaintiff may recover in respect of that not being paid.

Knowles, contra. In the first place there can be no division of what is here claimed, for the declaration is framed upon a guaranty as to both bills, and if such a guaranty be not proved the plaintiff must fail. But a guaranty must be signed by the party. Here, what the defendant writes across the bill he not only does not sign, but he writes it in the name of the plaintiff, and it is of no greater force than if the plaintiff himself had written it. There was no new signature; the guaranty proved was, therefore, one as to two bills of 200*l.* and 146*l.* respectively. Even if it could be said that what was done on the 29th amounted to a signature by the defendant, then the guaranty was bad because the consideration was past. The two bills had been previously accepted.

Cur. adv. vult.

The court having intimated on the 5th of June that judgment would be for the plaintiff, now finally delivered judgment.

POLLOCK, C. B. In this case the declaration stated that M. J. O'Connell agreed with the plaintiff to buy certain wines, part for 200*l.*, and part for 150*l.*, and thereupon, in consideration that the plaintiff would, at his own expense, procure stamps for and draw two

¹ April 15, before POLLOCK, C. B., PARKE, B., and PLATT, B.

bills, one for 200*l.*, and the other for 150*l.*, at six months, and deliver them to the defendant, he, the defendant, would get them accepted, and see them paid when due. And the breach was, that the defendant did not see them paid. It appeared that Mr. M. J. O'Connell did purchase two parcels of wine, one for 200*l.* and the other, as it was first supposed, of the value of 146*l.*, and a guaranty was given in this form. [His lordship read the letter.] As no bills existed at the time the memorandum was signed, and the plaintiff was to draw them, and they could only be drawn on stamps so as to be valid, it followed that the plaintiff was to procure the stamps at his own expense, and there was evidence, therefore, in support of the averment of that part of the consideration. It being discovered afterwards by the plaintiff that the true price of the second parcel was not 146*l.*, but 150*l.*, the bills were drawn, payable at the time as agreed for 200*l.* and 150*l.*, and the defendant got them accepted, gave them to the plaintiff, and then wrote across the face of the guaranty, in his own hand as follows, "I have received the two drafts, (one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*) both accepted by Mr. O'Connell," and the plaintiff signed this memorandum, but not the defendant.

On the memorandum, consisting of these two writings, being produced at the trial, it was objected that it was not a memorandum signed by the defendant of the contract declared upon. The original memorandum, signed by the defendant, was of an executory contract to be performed after the date of the transaction, in consideration that the plaintiff would draw two bills, one for 200*l.* and the other for 146*l.*, and hand them to the defendant, he, the defendant, would get the bills accepted and see them paid; and the contract was never performed by the plaintiff, for the 150*l.* was drawn instead of one for 146*l.*, and so far, no doubt, is clear. But for the plaintiff it was contended, that the memorandum written on the face of the original guaranty explained that this was a mistake, that the true contract was for a bill of 150*l.*; the memorandum, therefore, merely corrected the mistake, and being written on the same piece of paper and on the face of the guaranty, which was signed by the defendant, his original signature was a signature of the whole, and so satisfied the enactment of the Statute of Frauds.

If the defendant, by any memorandum signed by him, had stated that the original contract was, that if the plaintiff would procure stamps, and would draw two bills of 200*l.* and 150*l.*, the defendant would see them paid, but that the latter amount had been by mistake described as 146*l.*, it would have been sufficient, for the Statute of Frauds does not require the contract itself to be in writing, but any memorandum of it, and a memorandum properly signed of a by-gone contract is quite sufficient; and we also think that words introduced into a paper, signed by a party, or any alteration in it may be considered as authenticated by a signature already on the paper, if it is plain that they were meant to be so authenticated. The act of signing after the introduction of the words is not absolutely necessary. The difficulty in the case is, that the words, though written by the

defendant across the original guaranty, are not written as his words, but they are written as the words of the plaintiff. The effect of the instrument altogether is this: the original guaranty remaining unaltered with the subscription of the defendant, the plaintiff states he has drawn, instead of one of the bills, that for 146*l.*, a bill for 150*l.*, assigning the mistake of the invoice as the reason for that; and that he has received it back from the defendant, accepted as part performance of his original contract, and so discharges the defendant in that respect. It may, however, be inferred from the fact of the defendant himself writing the memorandum across for the plaintiff to sign, not only that he agreed that the bill for 150*l.*, previously substituted instead of the one for 146*l.*, should stand in the place of that for 146*l.*, and impliedly that the defendant should be responsible for it, but also that he admitted that the original contract was, that he should procure to be accepted and see paid any bills to the amount of the invoice of the second parcel of wine, and the invoice was 150*l.*, so that this would be proof of the contract alleged in the declaration in writing; if so, it may be inferred from the fact of the second memorandum being written on the same paper by the defendant, that it was meant to be authenticated by the old signature, so as to constitute a memorandum of the defendant's agreement in writing signed by the defendant. If so, the Statute of Frauds has been complied with. Although we have not come to this conclusion without some difficulty, and doubt still remains on the minds of some of the court, we think this is the true view of the case.

PLATT, B., added,— I had very great difficulty in this case, in bringing my mind to this conclusion, but I have now satisfied myself beyond all question that this is a part of the contract, and signed, in fact; that it is under the signature of the party who is sought to be charged. Suppose, after this instrument had been drawn, the defendant had with his own hand, altered the 146*l.* into 150*l.*, the agreement, there can be no doubt, would be sufficient without re-signing the agreement. Then, the effect of this memorandum, as it seems to me, is just the same as if the defendant had written upon the face of one of the two bills "that has been drawn for 150*l.* instead of 146*l.*, there being an error of the invoice," and then for the plaintiff to have written underneath that, "I have received the two above-mentioned bills." That being in the handwriting of the defendant, on the face of the original agreement, seems to me to be quite sufficient to justify the holding that this operates as a signature within the Statute of Frauds.

Rule discharged.

 Jeakes v. White.

JEAKES and another, executors of WILLIAM JEAKES, deceased,
v. WHITE.¹

July 1, 1851.

Frauds, Statute of—29 Car. 2, c. 2, s. 4—Interest in Land—Good Title, Meaning of—Title ex parte maternâ.

In an action to recover the expenses incurred by the plaintiff in investigating the defendant's title to mortgage certain lands, upon the ground that the defendant's title had turned out to be defective, the declaration stated, that, in consideration the plaintiff would advance 2,000*l.* upon the security of a mortgage of the land, upon the defendant's making out a good title to mortgage the said lands to the plaintiff, the defendant promised the plaintiff to pay him the expenses to which he might be subjected in case the loan should go off by reason of the defendant changing his views or of the defectiveness of the defendant's title. The evidence of the defendant's title was as follows:—The defendant, shortly before the agreement with the plaintiff, had contracted to purchase the premises of one W. E., who claimed as heir at law *ex parte maternâ* to one B. H., the person last seised. J. H., the father of B. H., married E. E., and died in 1787, aged 59, and devised the property to his son, B. H., and his two daughters, and, after their death, to B. H., in fee. The daughters both died unmarried, before B. H., who died a bachelor, in 1839. In order to negative the existence of any heirs *ex parte paternâ*, depositions in a chancery suit of *E. v. E.*, in 1843, had been forwarded to the plaintiff, in which the deponents stated that they were well acquainted with B. H., who had told them that "he had no relation left." And the deponents stated, that they believed B. H. had no relation left, on his father's side, living at the time of his death. It further appeared, that two issues had been directed in the same suit, in which both parties claimed the property as heir to B. H., *ex parte maternâ*; and that the jury had found, upon two occasions (the cause having been tried twice), first, that B. H. did not leave any heir *ex parte paternâ*; and, secondly, that the plaintiff in that suit (W. E., from whom the defendant claimed,) was the heir at law of B. H. *ex parte maternâ*. A statutory declaration had also been furnished to the plaintiff, in which the declarant stated, that B. H. and his sisters had told him, on several occasions, that they had no relations whatever on their father's side, and that they had often heard their father declare that he had no relations whatever, but that he was the last of his family:—

Held, first, that the agreement between the plaintiff and the defendant was not within the 4th section of the Statute of Frauds; and, secondly, per POLLOCK, C. B., ALDERSON, B., and PLATT, B., that the defendant had not made out a good title to the land; for that by "a good title" was to be understood such a title as the Court of Chancery would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment by any claimant; *dissentiente* MARTIN, B., who held that it was sufficient to establish a legal title in point of fact.

ASSUMPSIT. The declaration stated that, in the lifetime of William Jeakes, in consideration that W. Jeakes promised the defendant to lend him 2,000*l.* upon the security of a mortgage of certain lands, upon the defendant making out a good title to mortgage the said lands to the said W. Jeakes, the defendant promised W. Jeakes to pay the expense to which he, W. Jeakes, might be subjected, in case the loan should go off by reason of the defendant changing his views, or of the defectiveness of the defendant's title. Averment, that, although the said W. Jeakes, until the loan went off, was always ready and willing to lend the defendant the said sum on the security of the said mortgage, the defendant did not make out and show to W. Jeakes a good title to mortgage the said land, whereby the loan

¹ 21 Law J. Rep. (N. S.) Exch. 265; 6 Exchequer Rep. 873.

went off by reason of the defectiveness of the defendant's title to mortgage; that W. Jeakes had been subjected to the expense of 48*l.* 14*s.* in investigating the defendant's title to mortgage the land; and that the defendant had not paid that amount.

The defendant pleaded, first, *non assumpsit*; and, fifthly, that he did make out and show to W. Jeakes a good title to mortgage the land, concluding to the country.

At the trial, before Martin, B., at the sittings for Middlesex, in last Hilary term, the facts were as follows:—The action was brought by the plaintiffs, as the executor and executrix of William Jeakes, to recover the sum of 48*l.* 14*s.*, being the amount of costs which had been paid by their testator in investigating the defendant's title to mortgage certain land at Epsom, under the following circumstances:—The defendant being desirous of borrowing the sum of 2,000*l.*, a negotiation took place between him and W. Jeakes, in the course of which the plaintiffs' testator's solicitor wrote the following letter to the defendant's solicitor—

“Mr. Jeakes informs me that it has been arranged with your party for an advance of 2,000*l.*, on the security of the property mentioned in your letter to him of the 31st of May last, and there put at a rent of 126*l.* 14*s.*, but to which is to be added the ironmonger's shop, workshop, and premises. Please therefore to send me abstract forthwith. It is clearly understood betwixt us, that, should the loan go off by reason of your client changing his views, or of the defectiveness of his title, the expenses to which Mr. Jeakes will be subjected are to be borne by your client. Please to affirm this in your next letter.

“Signed,” &c.

In answer to this, the defendant's solicitor wrote as follows:—“We beg to forward you the abstract of the title. . . . At your request, we have to state that it is clearly understood that, should the proposed loan go off by reason of our client changing his views or of the defectiveness of the title, the expenses to which Mr. Jeakes will be subjected are to be borne by our client, but Mr. Jeakes is to agree to make the advance if the title is clear. Please affirm this. We shall be glad if you can expedite the business as much as possible.

“Signed,” &c.

No affirmance of this proposition was ever made in writing. Upon the abstract delivered by the defendant to the plaintiffs' testator, it appeared that the defendant, shortly before this transaction, had contracted to purchase the premises in question from one William Eggleton, who was in possession, and who claimed to be entitled to them as heir at law *ex parte maternâ* to one Benjamin Haswell, the person last seised. John Haswell, the father of Benjamin, married Eliza Eggleton, and died in 1787, aged fifty-nine, having devised the property to his son Benjamin and his two daughters, Jane and Frances, and after their deaths to Benjamin in fee. The two daughters died unmarried before Benjamin, who died in 1839, aged seventy-five,

never having been married. In order to negative the existence of any heir *ex parte paternâ* to Benjamin Haswell, the defendant forwarded to the plaintiffs' testator extracts from the depositions made in a suit in chancery of *Eggleton v. Eggleton* in 1843, to the following effect:—James Atherfold, aged fifty-two, deposed, "I was to a certain extent acquainted with the state of Benjamin Haswell's family. At the time of his death, from my communications with him and his two sisters, I believe that he had no paternal relation living at the time of his death, for I never knew or heard of any such relation; and when he buried the last of his two sisters, he told me he had no relation left." James Waters, aged forty-six, deposed, "I lived as servant to the said B. Haswell for the last twenty years of his life, and thereby acquired a certain degree of knowledge of the state of his family. The only relations of his that I ever knew or heard him speak of as living, during my acquaintance with him, were his two sisters, Jane and Frances Haswell, and both of them died before the said Benjamin Haswell; so that, as far as I know, or believe, he had no relation on his father's side living at the time of his death." Together with these extracts was sent the copy of an order of Vice-Chancellor Knight Bruce made in the above cause, directing the trial of two issues; first, whether Benjamin Haswell left any heir at law *ex parte paternâ*; secondly, whether Benjamin Haswell left the plaintiff in the said suit his heir at law *ex parte maternâ*; and it was ordered, that, on the trial of the issues the parties should admit that, up to the 27th of January, 1842, the defendants had not been able to discover that Benjamin Haswell had any relation on his father's side living at the time of his decease. These issues were tried twice at the Surrey assizes, (a new trial having been directed); and on both trials the jury found by their verdict—first, that B. Haswell did not leave any heir *ex parte paternâ*; and, secondly, that the plaintiff in the above suit was his heir at law *ex parte maternâ*. A decree was afterwards made in the Court of Chancery in accordance with these findings. The plaintiff in the chancery suit was the same William Eggleton, under whom the defendant claimed; and it appeared that the defendant in that suit also claimed the property in question as maternal heir of Benjamin Haswell. In addition to this evidence, the defendant also furnished two statutory declarations, in one of which the declarant stated, that he was on intimate terms with Benjamin Haswell and his two sisters, and had had conversations with them relative to their family, and that he had "on several occasions heard them declare, that they had no relations whatever on their father's side, but that their only relations were on their mother's side, of the name of Eggleton; and that they had many times heard their father, John Haswell, declare that he had no relations whatever, but that he was the last of his family." The plaintiffs' testator not being satisfied with this title, declined to advance the money, and the present plaintiffs after his death commenced this action.

On the part of the defendant, it was contended, first, that this transaction amounted to the sale of an interest in land under the 4th section of the Statute of Frauds, and that there was no complete

agreement in writing signed pursuant to that statute; and, secondly, that the title was not defective, and consequently that the defendant was entitled to succeed upon the first and fifth issues. The learned judge directed a verdict to be entered for the plaintiffs upon all the issues except the first and fifth, and upon these issues a verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter a verdict for them upon those issues also, with 48*l.* 14*s.* damages, in case the court should be in favor of the plaintiffs upon both points; it being also agreed between the parties that the question of law as well as of fact upon the title should be left to the court.

Bovill obtained a rule *nisi*, in pursuance of the leave reserved, in last Hilary term.

In Trinity term last (May 29),

Peacock and *H. J. Hodgson* showed cause. First, the contract upon which the plaintiffs seek to charge the defendant is a contract relating to an interest in land. It is therefore within the 4th section of the Statute of Frauds. The language of that section is not confined to "a sale" of land, but extends to "any interest in or concerning" land. The plaintiffs' promise, which is the consideration of the defendant's liability, clearly extends to an interest in land, and therefore the whole contract falls within the statute. Now the statute requires such a contract to be in writing; but the defendant's letter amounts to a mere proposal requiring affirmance; and as the plaintiffs failed to prove a written affirmance of the new term, no contract in writing was established.

[PLATT, B. Was the defendant bound to mortgage the lands?]
Possibly he was not.

[ALDERSON, B. Then the contract merely relates to the investigation of a title, the parties agreeing that, in case the title should turn out to be defective, the defendant should pay all the costs of the investigation. The contract does not relate to any interest in land, and is not within the statute.

POLLOCK, C. B. We all think that is the true construction of this agreement.]

Upon this point the following cases and text writers were cited: *Cocking v. Ward*, 1 Com. B. Rep. 858; s. c. 15 Law J. Rep. (N. s.) C. P. 245; *Inman v. Stamp*, 1 Stark. 12; 1 Addison on Contracts, 36; Dart on Vend. & Purch. 92, 104; *Vaughan v. Hancock*, 3 Com. B. Rep. 766; s. c. 16 Law J. Rep. (N. s.) C. P. 1; *M'Iver v. Richardson*, 1 M. & S. 557, and *Carrington v. Roots*, 2 Mee. & W. 248; s. c. 6 Law J. Rep. (N. s.) Exch. 95. Secondly, as to the fifth issue, there was reasonable evidence that William Eggleton, from whom the defendant claimed, was heir at law to the person last seised. The court is placed in the position of the jury, and the plaintiffs must make out that in point of fact this is a bad title. It is not a question whether there may be such a doubt as would prevent a court of equity from decreeing specific performance. The title is clearly in the heir at law of Benjamin. The question is, whether the evidence shows that the

defendant's vendor filled that character. It is not disputed that he is heir to Eliza Eggleton, Benjamin's mother. Then there is abundant evidence that there are no heirs *ex parte paternâ*. Direct proof of a failure of heirs, or of issue, can scarcely ever be given; depositions and declarations are a legitimate proof, such as is usually given in questions of this nature. Moreover, the decisions of two juries upon these precise issues are almost conclusive. *Waters v. Waters*, 2 De Gex & Sm. 591. The defendant was not bound to negative mere probabilities. *Sugd. Vend. & Purch.* 486, *Dart on Vend. & Purch.* 163, 165. The object of the Inheritance Act, 3 & 4 Will. 4, c. 106, was to do away with the necessity of tracing pedigrees further back than the circumstances of the case require. *Hubback on Evidence of Succession*, p. 121. With regard to the chancery suit being between rival claimants *ex parte maternâ*, that objection is obviated by the fact of the want of paternal heirs thus becoming a matter of notoriety, and so adding to the improbability of any existing, as no claim was afterwards made.

Bovill and *Phipson*, in support of the rule. The first point has been already disposed of by the court. Then, as to the fifth issue, there is really nothing but the merest shadow of a title in the defendant. The declarations and depositions are inconsistent, and even if relied upon, are no evidence that there are no heirs of John, the father of Benjamin; neither do they exclude heirs claiming through other more remote female ancestors who would be preferred. Then the issues prove nothing, as they arose between two parties, each claiming as heir *ex parte maternâ*, and each of whom was therefore interested to suppress any heir *ex parte paternâ*. No person could safely be advised to advance money on such a title as this, which rests merely on a nine years' possession. *Sugd. Vend. & Purch.* 390.

[*MARTIN, B.* There was no suggestion that any other person whatsoever was entitled. What more could possibly have been done?]

The plaintiffs' testator had a right to a clear title, and it is not sufficient to make out one which is open to doubt. *Hartley v. Pehall*, *Peake*, 31; *Emery v. Grocock*, 6 *Madd.* 54; *Scott v. Nixon*, 3 *Dru. & W.* 402; *Fort v. Clark*, 1 *Russ.* 601.

Cur. adv. vult.

POLLOCK, C. B., now said. The court has already disposed of the question on the Statute of Frauds. The remaining question is, whether the defendant did make out and show to the plaintiffs' testator a good title to mortgage certain land. The action was brought to recover the sum of 48*l.* 14*s.*, which had been paid as the costs of investigating the title. A verdict was entered for the defendant, my brother *Martin* reserving this question for the opinion of the court. If the defendant did not make out a good title, a verdict is to be entered for the plaintiffs for the amount so paid. Now, the title which the defendant made out was one said to be derived from the heir *ex parte maternâ* of the mother of Benjamin Haswell, the party last seised. It also appeared that certain issues out of chancery had been

tried, on which the jury had found that Benjamin Haswell had no heirs *ex parte paternâ*, and that the person under whom the defendant claimed was his heir at law *ex parte maternâ*; and it further appeared that statutory declarations had been made, to the effect that the party last seised had been heard to say that he never had any heirs on his father's side.

Now, the majority of the court are of opinion that the title by heirship made out was the weakest possible title of that description; that as the issues so found by the jury were tried between two heirs *ex parte maternâ*, both of them had an interest in keeping out of the view of the jury any heir *ex parte paternâ* who might exist; and that the statement of the person last seised, that he had no heirs on his father's side, is entitled to very little weight, as the expression is ambiguous, for it may mean either that he had no heirs of the same name on his father's side, or it may mean, and, indeed, could not well mean more than that there were no heirs on his father's side with whom he was acquainted, or that he was not aware that any such heir existed. It certainly cannot mean that he had no heirs at all on his own, his grandmother's, or his great grandmother's side.

The question is, whether, according to the agreement upon which the action is brought, the plaintiffs are entitled to recover the expenses of investigating this title, which were paid by their testator. The majority of the court are of opinion that the plaintiffs are entitled to succeed, and that the question really is, whether this was such a title as a vendee has a right to expect, and which would justify him in concluding the purchase.—We think that, where a question arises between parties who are about to enter into the relationship of vendor and vendee, as to the meaning of a good or sufficient title, there must be such a title as the Court of Chancery would adopt as a sufficient ground for compelling specific performance; and that by a stipulation for a good title must be understood, not such a title as would support a verdict for the purchaser in an action of ejectment against a mere stranger, but such a one as would enable the purchaser to hold the property against any person who might probably challenge his right to it. In the present case, the title, founded, as it is upon a possession of but a few years, and being itself the weakest possible legal title, is not such a title as would justify a court of equity in decreeing a specific performance, or would support an action of ejectment. The rule will, therefore, be absolute to enter a verdict for the sum of 48*l.* 14*s.*

MARTIN, B. I am sorry that I am unable to concur in the judgment now delivered. I am of opinion that the defendant ought to succeed, as I consider that the title which he has proved is sufficient. I am of opinion that the question is not whether a court of equity would compel him to assert his title, but absolutely whether he had a good or bad title in point of fact.

Rule absolute.

 Field v. Partridge.

FIELD and another v. PARTRIDGE.¹

May 6, 1852.

Costs — No Notice of Taxation — Judgment and Execution, Setting Aside.

Where judgment has been signed, costs taxed and execution issued for the amount of debt and costs without notice of taxation, the court will not set aside the judgment or execution, but will direct a review of the taxation.

IN this case the plaintiffs, having signed judgment, taxed their costs, and issued execution for the debt and costs without giving any notice of taxation, Platt, B., made an order for setting aside such execution, with costs. A rule *nisi* having been afterwards obtained for the defendant to show cause why such order should not be rescinded,

Wordsworth now showed cause. The order of the learned judge is good, and ought not to be set aside. *Lloyd v. Kent*, 5 Dowl. P. C. 125, undoubtedly shows that if the plaintiff taxes his costs without giving notice of taxation, that is not an irregularity sufficient to induce the court to set aside a judgment and subsequent proceedings; but in *Perry v. Turner*, Ibid. 30; s. c. 2 Cr. & J. 89; 1 Law J. Rep. (N. S.) Exch. 13, Bayley, J., says, "I have cautiously avoided expressing any opinion as to whether a neglect to give notice of taxation of costs gives the defendant's attorney a right to set aside the proceedings for irregularity."

[PARKE, B. In *Taylor v. Murray*, 3 Mee. & W. 141; s. c. 7 Law J. Rep. (N. S.) Exch. 53, where a similar question arose, the judges say, that according to all the decisions, the court will not set aside judgment and execution because no notice of taxation has been given, and certainly I have invariably acted on that rule.]

[MARTIN, B. I believe the practice has always been as my brother Parke has stated it.]

The execution ought to have been set aside.

[ALDERSON, B. Suppose a party waives his costs and signs judgment for his debt, surely that judgment is good. Then, if he signs judgment for too much, the amount must be reduced, but the judgment and execution ought not to be set aside.]

Willes, contra, for the plaintiffs, was not called upon.

POLLOCK, C. B. The rule must be absolute for setting aside the order of my brother Platt, as the omission to give notice of taxation does not render the judgment and execution irregular. It is admitted that a party may recover judgment and take out execution for what he has recovered, which shows that, to that extent at least, the judg-

¹ 22 Law J. Rep. (N. S.) Exch. 269; 16 Jur. 413.

Maguire v. Kincaird.

ment is right. The result in the present case is, that the court must correct any error that has been introduced into the taxation, but the execution ought not to be set aside.

PARKE, B. *Taylor v. Murray* settles this point, and at chambers I have invariably acted upon the rule there laid down. The proceeding merely affects the costs if they are taxed.

ALDERSON, B. It would be wrong in a case like the present to set aside the judgment or execution, as very serious consequences might ensue from taking that course.

PLATT, B., concurred.

*Rule absolute.*¹

MAGUIRE v. KINCAIRD.²

April 29, 1852.

Practice — Nul Tiel Record — Notice of Trial.

In an action on a judgment the defendant pleaded *nul tiel* record. The plaintiff joined issue, and gave notice on Saturday of his intention to produce the record on the following Monday:—

Held, that the notice was sufficient.

DEBT upon a judgment.

Plea — *Nul tiel record*. The plaintiff joined issue, and gave notice to the defendant, on Saturday, that he should produce the record on the following Monday. The record was produced accordingly, and judgment obtained in the absence of the defendant.

Honyman now moved for a rule to show cause why the judgment which had been signed, and all subsequent proceedings, should not be set aside, on the ground that four days' notice should have been given.

PLATT, B. Is not the notice sufficient?

PARKE, B. It is a notice by the plaintiff that he will produce his own record, and the notice is sufficient to enable the defendant to come and see that it is all right.

POLLOCK, C. B., and MARTIN, B., concurred.

Rule refused.

¹ See *Wheldal v. Northern and Eastern Railway Company*, 13 Mee. & W. 9; s. c. 13 Law J. Rep. (N. S.) Exch. 258.

² 21 Law J. Rep. (N. S.) Exch. 264; 7 Exch. Rep. 608.

Hickie v. Salomo.

HICKIE and another v. SALOMO.¹

June 26, 1852.

Costs — County Court — Concurrent Jurisdiction — Residence of one of two Plaintiffs.

Where one of several plaintiffs dwells beyond twenty miles from the defendant, the superior courts have concurrent jurisdiction with the county court, under the 9 & 10 Vict. c. 95, s. 128, and the plaintiffs will be therefore entitled to costs under the 13 & 14 Vict. c. 61, notwithstanding less than 20*l.* is recovered.

THIS was a motion for a rule calling on the defendant to show cause why the plaintiffs should not recover their costs under the 13 & 14 Vict. c. 61, notwithstanding that the amount recovered in the action was less than 20*l.*

Gray, in support of the motion.² The affidavits show that one of the plaintiffs dwelt more than twenty miles from the defendant at the time of the commencement of the action; the case, therefore, falls within the exception in the 9 & 10 Vict. c. 95, s. 128, which retains the concurrent jurisdiction of the superior courts, "where the plaintiff dwells more than twenty miles from the defendant." The plaintiffs are entitled to costs under the Statute of Gloucester, unless the defendant shows that they are deprived of them.

[ALDERSON, B. The last act says, that where the amount recovered is under 20*l.*, the plaintiff shall have judgment to recover such sum only and no costs, except in the cases thereafter provided, so that it rather lies upon the plaintiffs to bring themselves within the exception.]

It has been decided that where one of two defendants dwells above twenty miles from the plaintiff, the plaintiff is entitled to costs. *Parry v. Davies*, 1 L. M. & P. 379; s. c. 19 Law J. Rep. (N. S.) Exch. 284, and *Doyle v. Lawrence*, 1 L. M. & P. 379; s. c. 19 Law J. Rep. (N. S.) Exch. 368. The interpretation clause (sect. 142), of the 9 & 10 Vict. c. 95, enacts, that words in the singular number are to be understood to mean several persons or things.

Petersdorff, contra. The burden of proof is certainly on the plaintiffs, since the last statute and the interpretation clause of the 8 & 9 Vict. c. 95, is not an argument in favor of this application. Reading the 128th section together with the interpretation clause, the plaintiffs must dwell more than twenty miles from the defendant; and that is not the case here.

Cur. adv. vult.

¹ 21 Law J. Rep. (N. S.) Exch. 271; 16 Jur. 728.

² May 7, before PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

Hickie v. Salomo.

The judgment of the court was now delivered by —

PLATT, B. The plaintiffs having recovered in this court a verdict for a sum recoverable in the county court, moved for costs, on the ground that one of the plaintiffs lived at a distance greater, and the other at a distance less, than twenty miles from the defendant. On showing cause the counsel for the defendant objected that the plaintiffs did not bring themselves within the predicament presented by the 9 & 10 Vict. c. 95, s. 128; for if they were considered as constituting one plaintiff, or according to the interpretation clause (sect. 142), as being two plaintiffs, it could not be predicated of them that they dwelt more than a distance of twenty miles from the defendant, and in either case, they dwelt as much within as beyond that distance; that this would be a *casus omissus*, and that, unless they come within the language of the 12th section, the court had no jurisdiction to grant costs.

By the 9 & 10 Vict. c. 95, s. 128, it is enacted, "that all actions and proceedings which before the passing of this act might have been brought in any of her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if the act had not been passed." Under this act the defendant, in practice, applied to the court under the 129th section, in order to deprive the plaintiff of his costs. That was on an affidavit stating, among other things, that he and the plaintiff dwelt within the prescribed distance of each other. The practice was changed by the 13 & 14 Vict. c. 61, which deprived the plaintiff of his costs, if the cause of action should be within the jurisdiction of the county court, unless the judge who tried the cause should certify under the 12th section, or the plaintiff should, in pursuance of the 13th section of the act, make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of the judge at chambers, on summons, that the said action was brought for a cause of action in which concurrent jurisdiction is given to the Superior Court by the 128th section of the 9 & 10 Vict. c. 9, in which case the court in which the action is brought, or a judge at chambers may by rule or order direct that the plaintiff shall recover his costs. Under the 13 & 14 Vict. c. 61, therefore, the plaintiff applied to obtain his costs; and surely the facts which would have enabled him to resist successfully a motion by the defendant to deprive him of his costs under the 9 & 10 Vict. c. 25, will suffice under the 13th section of the 13 & 14 Vict. c. 61, to establish his right to recover. The cases in which that right is to attach are not changed; they are still those in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. The same state of facts, therefore, which would have entitled the plaintiff to his costs before the passing of the 13 & 14 Vict. c. 61, would, provided he satisfied the court or a judge of their existence, equally entitle him to costs now.

In *Parry v. Davies*, the affidavits on behalf of the defendant, omitted to state that more than one of them resided within twenty miles of

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the plaintiff. Lord Cranworth, then Baron Rolfe, held that the 128th section of the 9 & 10 Vict. c. 95, gave the Superior Court concurrent jurisdiction, and that the plaintiff was entitled to his costs. In *Doyle v. Lawrence*, the Court of Common Pleas adopted Lord Cranworth's decision, and held that the residence of one of the defendants more than twenty miles from the plaintiff made that case one of concurrent jurisdiction within the same section. The same principle must apply to a plurality of plaintiffs. We, therefore, think, that as one of the plaintiffs in this case resided more than twenty miles from the defendant, the jurisdiction was concurrent, and the plaintiffs entitled to their costs.

Rule absolute.

ALCARD v. WESSON.¹

June 2, 1852.

Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, ss. 213, 215, 216, 221, — Notice — Bankruptcy Certificate — Discharge of Debt — Bill of Exchange.

To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that, being a trader, he presented a petition to the Bankruptcy Court, under the 12 & 13 Vict. c. 106, which court appointed a private sitting, and that fourteen days before such sitting written notice was given to every person whom the defendant then knew to be his creditor, or whom he had any means of knowing to be his creditor, and amongst others to the drawer of the bill of exchange, and that he did not, at the time of giving such notices, nor did the Bankruptcy Court, or the official assignee know that the drawer had indorsed the bill, or was not the holder, or who was the holder, or the address of such holder; that the defendant filed an account of his debts, wherein he set forth a proposal to pay his creditors 7s. 6d. in the pound; that at such private sitting of the Bankruptcy Court the requisite number of creditors proved their debts and assented to the defendant's proposal; that the Bankruptcy Court proposed another sitting, of which the plaintiff had notice; that at such second meeting the requisite number of creditors proved their debts, and agreed to accept the defendant's proposal; that the Court of Bankruptcy then confirmed the proposal and agreement, and afterwards gave the defendant a certificate in the form in schedule A:—

Held, first, that the plea was bad in not averring that the resolution and agreement had been carried fully into effect, and the creditors satisfied pursuant to the 221st section of the 12 & 13 Vict. c. 106. Secondly, *dubitante* MARTIN, B., that the plaintiff was not barred as to his debt, seeing that he had not had notice of the first sitting.

Quære, Whether any of the creditors are bound by the certificate unless notice of the previous meetings be given to all of them.

ASSUMPSIT on a bill of exchange, drawn by J. Plews, upon and accepted by the defendant, and indorsed to the plaintiff.

Plea, *puis darrien continuance*, that the defendant was a trader, and being indebted to divers persons, presented his petition to the Bankruptcy Court, in the form contained in schedule A., to the 12 & 13 Vict. c. 106, (the Bankrupt Law Consolidation Act, 1849) annexed.

¹ 21 Law J. Rep. (N. S.) Exch. 281; 7 Exchequer Rep. 753.

The plea then set out the other proceedings under the Bankrupt Act, and stated that the Court of Bankruptcy appointed a private sitting to be held, and that fourteen days before such sitting written notice was given to every person whom the defendant then knew to be his creditor, or whom he had any means of knowing to be his creditor, and amongst others to J. Plews, the drawer, and that the defendant did not, at the time when such notices were given or sent, nor did the Bankruptcy Court, nor the official assignee, know that J. Plews had indorsed the bill, or was not the holder, or who was the holder and entitled to the proceeds, except J. Plews, or the address, description, or locality of such holder. The plea then stated that the defendant filed a full account of his debts and of the debt in question, and did set forth a proposal to the effect that he would pay his creditors a composition of 7s. 6d. in the pound; and that at the private sitting of the Bankruptcy Court the creditors of the defendant, to the amount of 10*l.* and upwards, proved their debts, and that three fifths in number and value of the creditors who had so proved, did assent to the proposal of the defendant; that the Court of Bankruptcy did then propose another sitting; that after the first, and before such second sitting, the plaintiff's attorney applied to the defendant for payment of the said bill, and that such application was the first intimation that the defendant had that the plaintiff, and not J. Plews, was the holder of the bill, and that the plaintiff was a creditor to the defendant; that the Bankruptcy Court made a special order that service of the notice of the second sitting at the last known place of abode of the plaintiff should be deemed sufficient, and that notice was served accordingly; that such second meeting was duly held, and that four other creditors of the defendant there proved their debts, and that three fifths in number and value of all those creditors who had proved debts to the amount of 10*l.* at either of those sittings agreed to accept the proposal of the defendant, which was assented to at the first sitting; that the Court of Bankruptcy then confirmed the said proposal and agreement, and caused it to be filed of record; that after the bill became due, and after the commencement of this suit, and within eight days now last past, the Court of Bankruptcy gave the defendant a certificate under the seal of the Bankruptcy Court in the form in schedule A., which set out, amongst other things, that the resolution or agreement had been duly carried into effect. The plea then stated that the debt in question had not been contracted by fraud, &c., or by reason of any judgment for breach of the revenue laws, or for breach of any promise of marriage, &c. Special demurrer.

Hawkins, in support of the demurrer, May 31. The plea is bad on several grounds. The question turns upon the construction of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. The effect of the 216th and of the previous sections is, that no creditors are barred by the certificate of the Court of Bankruptcy unless they have had notice of the private sittings. Here the plea does not aver that the plaintiff had notice of the private sittings; it merely alleges that

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notice was given to every person whom the defendant knew to be a creditor, or whom he had any means of knowing to be a creditor, and amongst others to the drawer of the bill. This is not a sufficient compliance with the statute; for notice ought to be given to every creditor, without exception, and no excuse or equivalent for such notice is of any avail. Secondly, the certificate of bankruptcy is inoperative in consequence of a non-compliance by the defendant with the provisions of the 221st section of the 12 & 13 Vict. c. 106. Before the defendant can be entitled to a discharge from his debts, he must show, in conformity with the terms of that section, either that the resolution or agreement had been carried into effect, or that the creditors had been satisfied. The plea contains neither of these averments, and is, therefore, bad. The case of *Levy v. Horne*, 5 Exch. Rep. 257; s. c. 19 Law J. Rep. (N. S.) Exch. 260, is in point. He also cited *Wagner v. Imbrie*, 6 Ibid. 882; s. c. 3 Eng. Rep. 584.

Watson, in support of the plea. The defendant is entitled to judgment. The effect of the 221st section is to render the certificate of the Court of Bankruptcy a bar to the plaintiff's claim, although he may not have received the notices mentioned in the 213th and 215th sections, seeing that the want of those notices is not mentioned in the exceptions in the act as a matter that will invalidate the certificate. The Court of Bankruptcy is a court of record; and a certificate given after the hearing and determination of a question is final. The plaintiff might have appealed under the 12th section, but not having done so, is bound by the decision of the court. *Levy v. Horne* is in point. There Rolfe, B., distinguishes between a protection given under one section and a certificate granted under another.

[MARTIN, B. The plea does not show that the time for granting a certificate had arrived.]

In the case of outstanding bills, it is scarcely possible to give notice to the holders. The granting of a certificate is a judicial act. The court will presume that the agreement mentioned in the plea has been carried into effect and the creditors satisfied. If this had not been the case, the commissioner would not have granted a certificate.

[ALDERSON, B. The 225th section seems to imply that a creditor, who has not had notice, is not barred.]

Thomas v. Hudson, 14 Mee. & W. 353; s. c. 14 Law J. Rep. (N. S.) Exch. 283, is in point.

[MARTIN, B. The plea ought to state that the resolution and agreement had been carried into effect, and the creditors satisfied.]

The court then intimated that they would consider the question, and, if necessary, would call on Hawkins to reply.

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POLLOCK, C. B., now said, — In this case we are of opinion that the plea is bad. The declaration was on a bill of exchange; the plea of *puis darrein continuance* was of the defendant's discharge under

the 220th section of the 12 & 13 Vict. c. 106. For the plaintiff, it was objected that the discharge was not available. It was contended that it might have been that the terms of the act of parliament were not complied with; and we are all of that opinion. The 221st section is this: that so soon as the said resolution or agreement shall have been carried into effect, and all the creditors of such petitioning trader shall have been satisfied according to the tenor thereof, the court shall give to such petitioner a certificate under the hand and seal of the commissioner, setting forth the filing of the petition, and so on; and then it says, and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy.

We are of opinion that the plea should have averred that the resolution and agreement had been carried fully into effect, and that the creditors had been satisfied, and, in the absence of those averments, we think the plea is bad. I must say, I think there is a great deal in what was pointed out by my brother Alderson in the course of the argument, that this, which is an arrangement between the parties themselves, although under the control of the court, can hardly be considered to extend to cases of creditors to whom no notice at all was given; for I observe in the very next section, which relates to an arrangement by deed, it is expressly provided that the effect of the arrangement should only prevail in respect to those persons who had had notice. But the principal point on which the decision of the court goes, is, that the plea itself is bad for want of those averments which I have pointed out. There will, therefore, be judgment for the plaintiff.

ALDERSON, B. I am of the same opinion. I own I think that the section does not extend, at all events, beyond those creditors who had notice. It is very arguable whether it applies at all even to those who had notice, unless all had notice.

PLATT, B. It seems very clear from the 216th section, that it can affect no creditor who has not had notice; because where a resolution has been entered into, according to the former section, the 216th section is this, that such resolution and agreement shall thenceforth be binding and of full force as against all persons who are creditors at the date of his petition, and who had notice of the several meetings, &c., it is quite clear no other persons are bound by that agreement.

MARTIN, B. I am also very clearly of opinion that the plea is bad on general demurrer. I think it is defective in not containing an averment that the resolution or agreement had been carried into effect, and the creditors satisfied according to the tenor of the agreement. The 221st section expressly enacts, that until that shall be done, the commissioners shall not grant a certificate. I apprehend that it is impossible that the commissioners can by any act of theirs supersede the plain enactment of the act of parliament, the object of the certificate being to bar a man's debt by a proceeding in which he has taken

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no part, and over which he has no control of any sort or kind. It seems that the case cited by the defendant's counsel was an action against a public officer, who acted in strict obedience to the direction of a court of record, and may be upheld on that ground; but I apprehend that it is no authority for saying that a man is to be deprived of his debt by the act of a commissioner of bankruptcy, which is not in conformity with the power given to him by the act of parliament; and no general doctrine arising from the authority of a court of record can confer on the certificate of a commissioner of bankruptcy any such effect. My opinion is, that the plea is bad in substance, for want of the averment.

With respect to the other point of notice, I own, I am not so clear; I am rather inclined to be of opinion that if a bill of exchange is in the hands of a person whom the applicant was unable to discover, the certificate would rather tend to bar that party, and it seems to me that, looking at all the sections of the act of parliament relating to the subject, and beginning at the 211th section, it was supposed that some time would be occupied in carrying out this matter, and some time would occur before the creditors were satisfied according to the tenor and effect of the agreement, so that in all probability all the creditors of a man would learn that such a proceeding was going on; and then, in the event of the debtor having omitted any person improperly from his petition, the 223d section rendered him liable to be at once made a bankrupt. I am rather inclined to be of opinion that down to the period when all the creditors whose names were mentioned in the petition were satisfied, those creditors who had not notice had a right to come in, and get the benefit of it, and they had a right to arrest the debtor according to the case of *Levy v. Horne*; but after the certificate was once granted, it would operate as an ordinary certificate. It is not necessary, however, to give any positive opinion upon that. I am very clearly of opinion that by reason of the want of an averment of satisfaction, according to the tenor of the agreement, this plea is bad in substance.

Judgment for the plaintiff.

MEGGISON v. BOWES (commonly called LADY GLAMIS) and others.

SELLS v. THE SAME.¹

May 8, 1852.

Replevin—Verbal Agreement to let Tithe free—Non tenuit.

Replevin. Avowry, that the plaintiff was tenant to the defendant, at a rent of 400*l.* a year. The plaintiff being the owner of a farm and lessee of the tithe commutation rent-charge,

¹ 21 Law J. Rep. (N. S.) Exch. 284; 7 Exchequer Rep. 685.

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under the Dean and Chapter of W., at a rent of 60*l.* a year, let the land verbally to the defendant, at a rent of 400*l.* a year, tithe free :—

Held, that as by the 80th section of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, in the event of the defendant distraining for the tithe rent, she would be compelled to allow the same to the plaintiff in account; the plaintiff was tenant to the defendant, at a rent of 400*l.*, and therefore that the avowry was proved.

REPLEVIN. Avowry, that the plaintiff held the premises as tenant to the defendant Bowes (Lady Glamis), by virtue of a demise, at a rent of 400*l.* a year.

Plea in bar, *non tenuit*.

At the trial, before Parke, B., at the last Hertfordshire spring assizes, it appeared that an agreement had been entered into between one of the defendants and the plaintiff, for a demise of the land, tithe free, on certain terms, namely, 400*l.* for the first, second, and subsequent years of the term, which was to be for twenty-one years, at a rent varying according to the average price of corn. There were also other stipulations in the agreement for a lease of land, which were not finally assented to by the plaintiff, so that the lease was never prepared. The plaintiff entered and occupied, and agreed to pay a rent of 400*l.* a year, the understanding of the parties being that the land should be demised to the plaintiff at a rent of 400*l.* a year, tithe free. Lady Glamis was the lessee of the Dean and Chapter of Westminster, having a lease for lives of the tithes, the land itself belonging to her. The value of the tithes was 60*l.* a year. The plaintiff had, previously to the distress, paid an entire rent at the rate of 400*l.* a year.

For the plaintiff, it was contended, on the authority of *Gardiner v. Williamson*, 2 B. & Ad. 336; s. c. 9 Law J. Rep. K. B. 233, that the avowry was not supported; that as there was no demise by deed the tithe did not pass, and therefore it was not proved that the lands were held at a fixed rent. The learned judge inclined to this opinion, and directed a verdict for the plaintiff, reserving leave to the defendants to enter a verdict for them, if the court should be of a contrary opinion.

E. James having obtained a rule *nisi* accordingly,—

May 4. *Chambers, Willes, and Lush* showed cause. The avowry was not proved. This was a demise of land and of all that issued out of it, and having been granted at an entire rent was void as to the tithes for want of being under seal; so that the distress for rent was unlawful, there being no distinct rent for the land. *Gardiner v. Williamson*. It makes no difference in this case that the tithes are commuted, for the rent-charge varies according to the price of corn; and therefore the case is the same as if the Tithe Act had not passed. In this case a court of equity, in ordering the agreement in question to be fulfilled, would have decreed a lease both of the tithes and land. Suppose the defendant, Lady Glamis, had sold the tithes, the situation of the tenant would have been this,—his want of possession of the tithes would have amounted to an eviction by the tortious act of the lessor, and the rent not being apportionable could not have been

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distrained for. *Neale v. Mackenzie*, 1 Mee. & W. 747; s. c. 6 Law J. Rep. (N. s.) Exch. 263. It is clear that Lady Glamis intended to demise both the tithes and the land.

E. James and *Rodwell*, in support of the rule. The defendants were entitled to distrain for the rent of 400*l.* a year. The intention of the parties to this demise was that the land only was demised, a circumstance which distinguishes the case from *Gardiner v. Williamson*, where there was an express demise of tithes. Besides, the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, makes a difference in this case. Again, the 80th section of the act is most important; it provides that any tenant "who shall hold his lands under a lease or agreement, providing that the same shall be holden and enjoyed by him free of tithes, or who shall occupy any lands by any lease or agreement made subsequently to such commutation, and who shall pay any such rent-charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord." The words, therefore, "tithe free" in this lease are mere surplusage. The plaintiff held at a rent of 400*l.* a year, and if he had been called upon by the defendant to pay tithe he might have deducted the amount from the rent.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court.¹ His lordship stated the facts and proceeded. In this case I reserved the question at the trial; but it struck me at that time, considering only the situation of the tithes before the passing of the late act, that if there was a demise by the owner of the tithes for the time being of lands tithe free (they being separate inheritances) it really meant an agreement on his part to demise both the tithes and the lands at the joint rent of 400*l.* a year; and that there being no demise in this case by deed, the tithe did not pass, and consequently it could not be said that the lands were holden at any certain rent. Whether that would have been the consequence if the Tithe Commutation Act had not passed is a matter, I believe, on which the court is not agreed, and upon which it is unnecessary to say any thing; for the effect of the Tithe Commutation Act appears to remove all difficulty in this case.

The Tithe Commutation Act passed before this agreement with Mr. Meggison; and I should say there was ample evidence of his agreeing to hold at the rent of 400*l.* a year, not upon the terms of a rent varying according to the price of corn. A distress was made, and the goods of the plaintiff, Mr. Sells, were, in one case, distrained, and he contested the legality of the distress; and in another case there was a replevin by Mr. Meggison, to which there was an avowing on the part of Lady Glamis at a holding of 400*l.* a year. The only question is, whether this demise, being subsequent to the Tithe

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

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Commutation Act, calculated at 400*l.* a year, the intention being that the tenant should not pay a tithe rent, the tithe having ceased to exist in point of law, whether that was a misdescription, or whether the defendant did hold the lands at 400*l.* a year.

Mr. Rodwell has referred us to the 80th section of the Tithe Commutation Act, which appears to us to solve any difficulty in the case. The parties must be presumed after that to have contracted, as the 80th section says they are to be presumed to contract; and that 80th section provides, that if there be any agreement for a lease of lands made subsequently to such commutation, any tenant who shall pay any such rent-charge shall be allowed the same in account with the landlord. And it provides sufficiently for this case; for as Lady Glamis was the owner of the tithes, and it was meant that the tenant should pay 400*l.* a year for the land, and not pay tithes, if she afterwards choose to distrain for this tithe rent she would be compelled to allow that in the account, and the tenant would occupy the land at 340*l.* a year, the rent-charge being 60*l.* It appears to us that the parties are to be taken to have contracted with regard to the 80th section, and that the contract was a contract for 400*l.* a year, and if Lady Glamis choose afterwards, there being the understanding that she should not enforce it (whether any action would lie against her for enforcing it or not is not a matter in question), but if she did choose afterwards to enforce it, then Mr. Meggison would have had his relief against her; and, therefore, we think that in this case there was sufficient evidence, notwithstanding that Lady Glamis was the owner of the rent-charge substituted for the tithes, that, as between the plaintiff and Lady Glamis he was to occupy at 400*l.* a year. Consequently, the verdict ought to be entered, pursuant to leave reserved by me, for Lady Glamis, the defendant, in both the cases. The rule will, therefore, be made absolute.

Rule absolute.

COUNTY COURT APPEAL.

GREAT NORTHERN RAILWAY COMPANY, appellants, v. SHEPHERD, respondent.¹

June 19, 1852.

Carriers by Railway — Luggage — Merchandise.

If a passenger on a railway carry merchandise packed up with his personal luggage, the railway company are not responsible for the value of the merchandise if the luggage be lost from the train. But if the merchandise be so packed as to be obviously merchandise to the eye, the railway company will be responsible for the loss in the absence of any bargain to the contrary.

THIS was an appeal from the county court of Yorkshire, holden at

¹ 21 Law J. Rep. (N. S.) Exch. 286; 8 Exchequer Rep. 30. Before PARKE, B., and PLATT, B.

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Sheffield. It was first heard at the sittings after Hilary term, and a report will be found, 21 Law J. Rep. (N. S.) Exch. 114; s. c. 9 Eng. Rep. 477, but the following rule was afterwards made:—

“Upon reading the special case stated between the parties for the opinion of this court, and upon hearing Mr. Phipson, counsel for the defendants, the appellants, and Mr. Mellor, counsel for the respondent, it is ordered that the special case be referred back to the judge of the said county court to state the terms upon which the defendants carried passengers by the excursion train in question, and whether they carried them upon the same terms contained in the 6th section of the statute 7 & 8 Vict. c. 85. By the court.”

The following supplemental case was accordingly prepared, and was now (May 12) submitted to the court:—

“The Court of Exchequer having, on the hearing of the appeal, ordered that the special case be referred back to the judge of the county court to state the terms upon which the defendants carried passengers by the excursion train in question, and whether they carried them upon the terms contained in the 6th section of the statute of the 7 & 8 Vict. c. 85, I have to state that no evidence was given or tendered as to the terms upon which the defendants carried passengers by the excursion train in question, unless the admitted fact that the charge for each third class passenger by the said train was much less than 1*d.* for each mile travelled, be of itself, in the opinion of the court of appeal, sufficient proof in point of law that they carried them upon the terms contained in 6th section, and (subject to such opinion of the said court) I find that the defendants did not carry passengers by the said excursion train upon the terms contained in the 6th section of the statute 7 & 8 Vict. c. 85, and that there was no special contract as to the terms between the plaintiff and the defendants, but that they carried him and other passengers and their luggage by the said train upon the same terms as those upon which the defendants and other railway companies carry passengers, whether of the first, second, or third class, and their luggage, by their ordinary passenger trains, and which terms, as I conceive, are the same as those on which stage-coach proprietors and other common-carriers of passengers for hire do by the laws of England carry passengers and their luggage. I ought to add, that had I been specially called upon at the trial to find the terms upon which passengers were carried by the said train, I should have found them as above set forth; but I considered, and stated, that it was unnecessary for me to do so, because, even on the assumption that the defendants were right in contending that they carried the plaintiff on the terms contained in the said sixth section of the statute, I thought they were liable for the loss of his goods, and that, consequently, *à fortiori*, they were so if they did not carry him on such terms. I would take the liberty of respectfully adding further, that the county court judge does not state the case on appeals, he merely signs the statement prepared by the parties if they agree, and determines which

of two statements is to be adopted when they differ, unless he happen to notice some manifest error or omission.

(Signed)

“ W. WALKER.”

Phipson, at the sittings after Easter term¹, appeared for the appellants. No point will arise upon the 7 & 8 Vict. c. 85, s. 6, which regulates the amount of luggage to be carried by passengers in a parliamentary train, for it must be conceded that there is no evidence as to the terms with respect to luggage upon which the passengers in this train were carried. The question must be decided according to the general common law liability of the company as carriers; and whilst it may be admitted that they would be liable for the loss of the ordinary luggage of a passenger, it is submitted that they are not liable for that which, although carried by the passenger as luggage, is merchandise. Here the plaintiff himself concealed the nature of what he was carrying, and although no fraud was intended, it amounted to a fraud in law, so as to relieve the company from liability. The principle is laid down by Lord Mansfield in the case of *Gibbon v. Paynton*, 4 Burr. 2298. There, a man sent 100*l.* in money from Birmingham to London, and hid it in hay in an old nail-bag. The bag arrived safe, but the money was gone. Lord Mansfield said, “ His (the carrier’s) warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards or other methods of security, and therefore he ought in reason and justice to have a greater reward; consequently, if the owner of the goods had been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier.” As regards the personal luggage, the company cannot dispute their liability, and must pay those items, amounting to 1*l.* 3*s.* 6*d.*

Field was now heard for the respondent, the plaintiff below.² There was no special contract between the parties, and no notice, therefore, limiting the liability of the company as common-carriers. It is a different case from *Batson v. Donovan*, 4 B. & Ald. 21, where the jury expressly found that there had been an unfair concealment.

[PARKE, B. What is the contract of the carrier? It is to carry the passenger and his luggage. . If you do not give them notice they cannot know the contents of the package and the risk they run. They might have demanded an extra payment had they known it was merchandise.]

It was the duty of the company to inquire. In *Riley v. Horne*, 5 Bing. 217; s. c. 7 Law J. Rep. P. C. 32, Best, C. J., in his judgment said, “ A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are, and what they are worth, the carrier may refuse to take

¹ May 12, before ALDERSON, B., and MARTIN, B.

² June 19, before PARKE, B., and PLATT, B.

charge of them, but if he does take charge of them he waives his right to know their contents and value." That is precisely what has been done by the defendants in this case. In *Gibbon v. Paynton*, and *Batson v. Donovan* there was fraud, which is not pretended in this case. Suppose a passenger who is allowed 112 *lbs.* of luggage takes 113 *lbs.*, would that exempt the company from liability for loss?

[PARKE, B. No; it is their business to weigh it.]

They should also inquire as to the nature of the luggage. No fraud was intended by the plaintiff. Here, also, there was a new contract after the collision. The plaintiff was prevented from looking after his luggage, and the company then undertook to forward it to its destination. He cited *Coggs v. Bernard*, 2 *Ld. Raym.* 909.

PARKE, B. In this case, there being no special contract, the defendants were only bound to carry the plaintiff and his luggage, and under that term may be comprised his clothing and every thing required for his personal convenience, and perhaps even a small present, had he had such with him, or a book on the journey might also be included in that term; but they were certainly not bound to carry merchandise and materials intended for trade, and to be sold at a profit. [His lordship, having stated the facts, proceeded.] Had the railway company, with full notice of what the passenger was carrying, chosen to treat it as luggage, they would have been responsible for the loss; but their duty as common-carriers was only to carry luggage, and not merchandise or articles wholly disconnected with personal luggage. If they had had notice, they might have refused to carry it without an additional payment, but they had no opportunity of acquiring this knowledge in this case. Whether this was done with any fraudulent intention it is not material to inquire, for if without any fraud the passenger has so conducted himself that the company were not apprised of the nature of what he was carrying, it is the same in effect as if a fraud had been intended. Then it is contended that a new species of contract was entered into between the parties after the accident, and that the company undertook to take care of the luggage. But they only agreed to carry the plaintiff as a passenger, and after the accident occurred there was no new contract; they only intended to carry out the original contract, and the subsequent carrying became a part of it. The company, therefore, is not liable for the loss. The judgment of the court below will, therefore, be reversed; but, considering all the facts of the case, I think the usual rule as to costs should not be insisted upon.

Judgment reversed, without costs, the defendants undertaking to pay 1l. 3s. 6d., the value of the plaintiff's personal luggage, if not already paid.

PARROTT and another, assignees of LOVE, an insolvent, v. ANDERSON.¹

November 15, 1851.

Landlord and Tenant — Rent, Payment of — Right of Distress — Agent.

A tenant being indebted to his landlord for rent, the agent of the landlord, without his authority of knowledge, took a bill of exchange from the tenant for the amount of the rent, and paid over the amount of the rent to the landlord in his settlement of account. The bill was afterwards dishonored whilst in the hands of a third party, and the rent was not paid by the tenant, whereupon the landlord distrained:—

Held, to be a question for the jury, whether the bill was discounted for, or the money lent to the tenant by the agent, or whether it was an advance by the agent to the landlord; and that if the bill was discounted for, or the the money so lent to the tenant, the landlord was not entitled to distrain; otherwise he was entitled.

So in another case where, on the rent becoming due, the agent for both tenant and landlord paid the amount of rent to the landlord without any authority from either party, and the tenant afterwards failed to pay the rent, and the landlord distrained. (See note, next page.

CASE for an excessive distress. Plea — Not guilty.

At the trial, before Maule, J., at the last Northamptonshire summer assizes, the facts were these:— Love being tenant to the defendant, who was the mortgagee of a farm, was indebted, in July, 1850, to the defendant in the sum of 146*l.* for rent due on the preceding Lady day. In August, 1850, a receiver of the rents having been appointed for the estate, the receiver's agent, named Faux, took from Love a bill of exchange at four months for 146*l.* which he paid in to his bankers. Shortly before the 10th of August, Faux had remitted to the receiver 1,200*l.*, being an advance generally on accounts of rents, including 106*l.* part of the rent due from Love, giving credit for it in his accounts to the receiver as if the money had been paid; and, on the 10th of August, he remitted to the receiver the remaining sum of 40*l.* This was done without the authority either of the tenant or the defendant or his agent. The bill having been afterwards dishonored, and the tenant having become insolvent in February, 1851, the defendant distrained the tenant's goods on the 5th of March, 1851, whereupon the assignees brought the present action. The learned judge being of opinion that the plaintiffs were not entitled to succeed, it was arranged that the case should not be left to the jury, and the plaintiffs were accordingly nonsuited, leave being reserved to them to move to enter a verdict for 80*l.* if upon the facts of the case the judge ought to have directed a verdict for them.

Nov. 7. *Humfrey* moved accordingly. The defendant had no right to distrain for the rent, for he had received payment of it from his agent. The agent trusted to the tenant Love, and remitted the

¹ 21 Law J. Rep. (N. S.) Exch. 269; 16 Jur. 413; 7 Exchequer Rep. 93.

Parrott v. Anderson.

whole of the rent to the defendant. The agent cannot by law recover back that sum from the defendant.

[POLLOCK, C. B. The tenant cannot avail himself of a payment made under circumstances like these.

ALDERSON, B. Suppose the landlord had taken the bill of exchange, and it had been dishonored, would he not have power to distrain?]

He would.

[ALDERSON, B. What difference, then, is there between that case and the present?

PARKE, B. Is not the defendant liable to repay his agent, on the ground of the money having been paid to the defendant under a mistake of facts?]

The question turns upon the point, whether the agent could recover the money back from the defendant; if he could not, then the rent due to the defendant has been paid, and he had no right to distrain.

[POLLOCK, C. B. If rent has been paid to an agent by a bill, and that bill is dishonored, the tenant must still pay the principal.]

The agent debited himself with the receipt of the rent.

[POLLOCK, C. B. Suppose the agent had sent the money to the defendant without taking any bill from the tenant, would that make any difference?

PLATT, B. Your argument must be that the agent lent the money to the tenant.]

That is the argument.

[PARKE, B. A similar point arose in this court some time ago in *Griffiths v. Chichester*.¹ The question is, whether this payment by

1 GRIFFITHS v. CHICHESTER.

Trespass for breaking and entering the plaintiff's close and seizing his crops.

Plea (amongst others), that the plaintiff was tenant to the defendant of the close in question, at the yearly rent of 110*l.*, payable on the 24th of June, and the 24th of December; and that on the 24th of December, 1848, the sum of 110*l.* was due for one year's rent; whereupon the defendant took the crops as a distress.

Replication, that the plaintiff was paid the sum of 110*l.* after the rent became due and before the time of the distress.

At the trial, before Williams, J., at the Worcestershire summer assizes, 1850, the facts were these:—The plaintiff had mortgaged a farm to the defendant to secure the sum of 2,400*l.* The mortgage deed, after reciting that the plaintiff had obtained and become tenant to the defendant of the premises in question, at the yearly rent of 110*l.*, contained a demise of the premises to the plaintiff, at the above rent, payable on the 24th of June, and the 24th of December. Then followed a covenant by the plaintiff to pay interest at 4½ per cent. "on the days and times, and in manner, hereinafter mentioned," and then followed a covenant by the plaintiff to pay the rent on the 24th of June, and the 24th of December. The first half-year's rent due on the 24th of June, 1848, was paid to the defendant, on the 4th of July, by Messrs. Higgins & Chamberlain, who acted as solicitors for both the plaintiff and the defendant. The half-year's interest due on the 24th of December, 1848, was also paid by Messrs. Higgins and Chamberlain on the 21st of February, 1849. These payments were made without any previous authority from, or subsequent ratification by, the plaintiff. On the 29th of March, 1849, the defendant distrained the plaintiff's goods for the 110*l.* so paid. The learned judge directed the jury to say, whether the payment made by Messrs. Higgins & Chamberlain was a payment on behalf of the plaintiff, or an advance in the course of business to the defendant, adding that if the

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the agent was a loan to the tenant. If it was, the rent has been paid; but if it is an advance to the landlord, there has been no payment. That is a question of fact.]

The tenant's liability has been altered by the fact of the bill having been indorsed over. He is now liable to two persons. The rule acted upon in *Skyring v. Greenwood*, 4 B. & C. 281; s. c. 6 Dowl. & R. 401 applies.

[PARKE, B. *Davis v. Gyde*, 2 Ad. & E. 623; s. c. 4 Law J. Rep. (N. S.) K. B. 84, decides that the taking of a promissory note by the landlord does not of itself suspend the right of distress.

POLLOCK, C. B. We will see my brother Maule on the subject.

PARKE, B. If the transaction amounted to a discounting of the bill by the agent on account of the tenant, there was a payment to the landlord; but if it was merely an advance to the landlord by his agent, it was not a payment.]

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. In this case, which was a case tried before my brother Maule, the judgment of the court was suspended with a view to consult my learned brother Maule, and he reports that he was desired to leave the matter to the jury only if he could tell them they must find a verdict for the plaintiff. There will, therefore, be no rule. The case of *Griffiths v. Chichester*¹ was cited on the argument, where, I think, precisely the same point had arisen, and had been decided in this court. The merits, therefore, in point of law are clearly with the defendant; but if any thing turns on the view the learned judge took, he reports to us that he acted just as he was desired to do, and we are quite satisfied with the result.

Rule refused.

interest had been paid, the rent had been paid. The jury found a verdict for the plaintiff damages 10*l.*, leave being reserved for the defendant to move to enter a verdict for him,—

Nov. 4, 1850. *Whateley* moved accordingly, and also for a new trial, on the ground of misdirection.—First, the payment of interest by Messrs. Higgins & Chamberlain having been made without any authority, did not, in point of law, discharge the debt. Secondly, the mortgage deed does not, upon the face of it, identify the rent with the interest. Under such a form of deed, the plaintiff is liable at law for both interest and rent, though the defendant would be bound to account in equity. If the defendant had brought an action of covenant for the rent, it would have been no answer that the interest had been paid.

PARKE, B. The covenant is that the plaintiff would pay interest "in manner hereinafter mentioned," that means by way of rent. The only question was, whether the payment was made on behalf of the plaintiff or by way of advance to the defendant; and as to that, there was no misdirection. There is, therefore, no ground for a rule.

POLLOCK, C. B., and ALDERSON, B., concurred.

Rule refused.

¹ See preceding note.

THE ATTORNEY-GENERAL v. LORD HENNIKER.¹

February 7, 1852.

Legacy Duty — Power to charge Estate with Annual Sum in Lieu of Dower — Purchase — Appointment.

A special verdict stated that J. Major Lord H., by his will directed the purchase of estates in Suffolk to be made with the proceeds of his estates in Essex. The will contained a clause with a power enabling the tenant for life, who should be entitled to the rents of the estates to direct them to be sold, and a deed of settlement to be made of them, and that there should be inserted therein a power that the tenant for life should be entitled to the rents, and should have power to charge such estates with an annual sum not exceeding one third part of the annual value, for the benefit of any woman he might marry. The testator having died, was succeeded by his son, J. Minet Lord H., who charged the Suffolk estates with the payment of 2,000*l.*, free of taxes and other deductions, for the benefit of his wife, for her life; the said sum to be in the nature of, and in full, for her jointure, and to be in bar, lieu, and satisfaction of and for her dower or thirds, &c. The will then provided that, in the event of the testator not being authorized to charge the estates with so large a sum as 2,000*l.*, his other estates should be liable to supply the deficiency. The defendant was in possession of the estates, and was the heir of the second testator, J. Minet Lord H., who was the surviving trustee of the first testator. No deed of settlement was ever executed:—

Held, that this could not be considered as a purchase of the dower or thirds, but was an appointment of the legacy, upon condition; that the legacy was taken as a gift of the testator, and that the legacy duty was payable upon the interest of one third of the value of the rent of the Suffolk estates, to be ascertained on the death of the testator.

Quære, if this had been a condition annexed to the legacy by the second testator, whether the whole of the money received by the legatee would have been a legacy, or whether a part of it would not have been a purchase of some interest that might reduce the duty to be paid upon the legacy.

THIS was an information against the defendant, the third Lord Henniker, for the non-payment of legacy duty upon the sum of 12,578*l.*, that sum being the estimated value of an annuity of 1,126*l.* 13*s.* 4*d.*, in respect of which it was alleged that legacy duty was payable. The defendant having pleaded the general issue, a special verdict was taken by consent, which stated as follows:—

John Henniker Major Baron Henniker made his will on the 26th of May, 1821, and after disposing of his property in different ways by the bill, gave directions as to the purchase of estates in Suffolk, with the proceeds of the estates in Essex and other counties, and the will contained a clause with a power, enabling the tenant for life who should be entitled to the rents and profits of the estates, to direct the estate to be sold, and a deed of settlement to be made of the estates, and that there should be inserted in that settlement a power that the tenant for life should be entitled to the rents and profits of the estate so settled by deed or will duly executed, and should have power to charge all or any part of such estates with any annual sum or sums of money, not exceeding one third part of the annual value thereof, unto and for the benefit of any woman or women with whom he or

¹ 21 Law J. Rep. (N. S.) Exch. 293; 7 Exchequer Rep. 331.

they might respectively happen to intermarry. It then stated the death of John Henniker, the first Lord Henniker, and that John Minet Henniker Major Baron Henniker afterwards succeeded to that estate, and became the second Lord Henniker; and that he, by his will, directed the property in question to be charged with the payment of the annual sum of 2,000*l.* free and clear from taxes, and without any other deduction whatsoever, for the benefit of his wife, Mary Lady Henniker, during the term of her natural life; the said yearly rent or annual sum of 2,000*l.*, to be in the nature of and in full for the jointure of her, the said John Minet Henniker's said wife, and to be in bar, lieu, and satisfaction of and for her dower or thirds at common law, or by or on account of custom, free bench, or widow's part, which she could, should, or otherwise might have, or claim of, in, or out of the freehold, copyhold, or customary manors, messuages, farms, lands, tenements, &c., of him, the said John Minet Lord Henniker.

The will then proceeded thus:—“In case he, the said John Minet Henniker Major Baron Henniker, was not authorized and empowered by the said will of the said testator, John Henniker Major Baron Henniker, to charge the estates thereby devised and directed to be purchased and settled respectively as aforesaid, with the payment of so large an annual sum as 2,000*l.*, by way of jointure, the deficiency, if any, should be a charge upon, and the said John Minet Henniker Major Baron Henniker, thereby expressly charged and made liable, such part and parts of certain of his real estates and hereditaments, in and by his said will devised as should not be sold under the trusts in his said will contained as hereinafter mentioned, with and to the payment of such deficiency.”

The special verdict then stated the death of John Minet Lord Henniker, and the entry by the defendant, who was the heir of his father, John Minet Lord Henniker, into the receipt of the rents and profits, that Lady Mary Henniker was a stranger in blood, and that the value of the estates, or the rent of a third of the estates, was only 1,116*l.* 13*s.* 4*d.*; and it then stated a calculation in case there should be a deduction for the value of the dower, or thirds, or free bench of Lady Henniker. No deed of settlement had ever been executed. The question was, whether the defendant was liable to the payment of the above legacy duty.

The case was argued (Feb. 6,) by —

* *W. P. Wood (Solicitor-General)* on behalf of the crown. The defendant is liable to the payment of legacy duty. In *The Attorney General v. Jackson*, 2 Cr. & J. 101; s. c. 1 Law J. Rep. (n. s.) Exch. 21, a testator gave a life estate in his freehold property to Charlotte T., and after her decease, and in the event of her husband Joseph T. surviving her, he gave him an annuity or yearly rent-charge of 500*l.*, payable quarterly, and it was held that legacy duty was payable on this devise to Joseph T. *Stow v. Davenport*, 5 B. & Ad. 359, is to the same effect. In the case of a power created by will to charge land with an annuity, the appointee takes under the will creating the power, and not under the will that executes the power. *The*

The Attorney-General v. Lord Henniker.

Attorney-General v. Pickard, 3 Mee. & W. 552; s. c. 7 Law J. Rep. (N. S.) Exch. 188. In error, 6 Mee. & W. 348; s. c. 9 Law J. Rep. (N. S.) Exch. 329. It will be contended on the other side that here there are special circumstances which distinguish this case from the authorities on the point. It will be said that a deed of settlement was by the first will required to be executed and was not executed, and that the circumstance prevents Lady Henniker from taking under the first will. But that argument is fallacious, inasmuch as equity considers that thing to be done which ought to be done, and, therefore, it is the same as if a deed had been executed. Besides, the second will operates upon the property in that deed by virtue of the power created by the first will. Secondly, it will be said that the power was not well executed, because more was given than the first will authorized. But, in fact, that is not so, and if it were, the execution of the power would be bad so far only as related to the excess. 2 Sugd. on Powers, 68. Thirdly, there is no force in the argument that other property is charged than that of the original testator. Fourthly, it will be said that Lady Henniker took as a purchaser, having given up her dower. If, indeed, a legacy is given to a creditor, no duty attaches; but if a legacy is given by a father to a creditor of his son, duty is payable. The fact of a condition being annexed to a legacy does not prevent the duty from attaching.

Hoggins, for the defendant. This case is distinguishable from *The Attorney-General v. Pickard*. In the present case Lady Henniker took as purchaser; in *The Attorney-General v. Pickard*, there was the power of making a gift to any one. Here the power is confined to the making a gift to the wife of the donee in bar of dower. Lady Henniker, in the present case, would have taken dower out of the very estate which was charged with the legacy. She took as purchaser for a valuable consideration. *Blower v. Morrett*, 2 Ves. sen. 420, shows that where a legacy is given to a wife in lieu or satisfaction of dower, she is not, in case the assets should prove deficient, to abate in proportion with the other legatees. Lady Henniker did not take as legatee or donee. *Heath v. Dendy*, 1 Russ. 543, and *Davenhill v. Fletcher*, Amb. 244, are also in point. A condition is attached to this legacy; but suppose the condition countervailed the value of the legacy, would it be a gift at all?

[PARKE, B. The crown would be entitled to duty on all that amounts to a legacy. A legacy is a gift; the question is, how much of this legacy is a gift?]

This is the case of a purchase, not of a gift.

W. P. Wood (Solicitor-General), in reply. This is a gift charged on the real estate of the testator, and is not the less a gift because the party taking the bequest enters into a bargain for the benefit of the person nominating. Here the legatee had no dower in the testator's estate, which distinguishes the case from the suggested case of a purchaser. The bargain made by the legatee could not affect the testa-

tor's estate, or the right of the crown. The legatee could only get this property as a gift under the will of the original testator.

Cur. adv. vult.

On the following day —

PARKE, B. delivered the judgment of the court.¹ This was a special verdict which was argued before us yesterday, and we took time and have considered the case, and are of opinion that our judgment ought to be in favor of the crown.

[His lordship stated the substance of the special verdict as above set out, and proceeded.]

In the course of the argument, the points in dispute between the parties were ultimately reduced to one single point. It is perfectly clear, in the first place, and, indeed, it was not denied by Mr. Hoggins, who, on behalf of Lord Henniker, was desirous that the case should be taken on the merits, that though no deed was executed, there was an equitable power to charge the estates with an annuity. The case, therefore, falls within the principle of the decision of this court in the case of *The Attorney-General v. Pickard*.

In the next place, it is perfectly clear that the present Lord Henniker, either as the heir of his father, who was the surviving trustee, or as the tenant for life in possession, was the person who, by the act of parliament, was bound to pay duty, either as trustee or as the person in possession.

In the next place, it is clear that after the decision of *The Attorney-General v. Pickard*, this case may be considered precisely in the same way as if, instead of an annuity charged upon the lands, there had been a bequest of a sum in gross, say 1,000*l.*, to be appointed, if the second Lord Henniker died before, to his wife. Then the only question in the case is, whether there had been such an appointment to the wife as, by virtue of that appointment, to make her a recipient of the legacy. There was a little doubt in the course of the argument — a doubt which was removed from the minds of all the court by the reply of the Solicitor-General. The case, therefore, becomes this: a power is given by the will of the first Lord Henniker to the second Lord Henniker, to appoint the 2,000*l.* to his wife, if he thinks fit, and he is to appoint it to his wife, and, by the same instrument by which he appoints, he imposes on her the condition of relinquishing the dower or thirds, and free bench of all the copyhold estates. The question is, whether that can be considered as a purchase of the dower or thirds, and free bench, so as to be treated as a purchase in fact, or whether it is a condition on the receipt of the legacy, which condition she accepts, and makes no conveyance, but is still the recipient of the legacy.

Now, we are of opinion, that this is nothing more than an appointment of the legacy upon a condition. The wife knows by the instrument by which the legacy is appointed, that it is a legacy,

¹ POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

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and if she takes it, she takes it as a gift of the testator; and no matter whether the person who exercises the power of appointment annexes a condition to the gift or not, still it is the gift of the testator, and is taken from the testator; therefore it becomes liable to the legacy duty. There were some points raised in the course of the argument of a nice character, which might have raised some question if this had been a condition annexed to the legacy by the testator himself; then there would have been a question whether the whole of the money so received by the legatee was a legacy, or whether a part of it was not a purchase of some interest that might possibly reduce the duty to be paid upon the legacy, and so the difference in value between the legacy and the estate given up in consideration of it. It may be so; that is a point that may be settled hereafter, if it becomes necessary. It is enough to say that that point does not arise here, because this is just a case in which there is no condition annexed by the testator; nor does it make any difference in this case whether the legatee is liable to pay legacy duty or not. There is nothing in the statement of the case to show this.

If the question was hereafter to arise between Lord and Lady Henniker, on an endeavor to recover back the money, the former was compelled to pay as legacy duty, it may be material to consider whether or not the legacy duty was to be paid by the legatee, or out of the estate; but no question arises about that matter here. The case is precisely the same as the one I have already stated; it comes to that simple case, and in that simple case the court is of opinion that the person taking the legacy takes it only by the gift of the testator, and, consequently, must pay the legacy duty. It is the second will which creates the liability to the duty.

The legacy duty will have to be paid upon the interest of one third of the value of the rent of the Suffolk estates at the time of the appointment; consequently when the will took effect on the death of the second Lord Henniker, the value of the estate was to be determined, and the duty is to be paid on one third of the annual receipts of the Suffolk estates.

Judgment for the crown.

HORTON v. THE WESTMINSTER IMPROVEMENT COMMISSIONERS.¹

June 2, 1852.

Estoppel — Fraud on third Parties — Public Commissioners — Power to borrow Money.

The Westminster Improvement Commissioners were authorized by several acts of parliament to borrow such sums of money as they should think necessary for the purposes of the act, and to give bonds for the same, and which bonds were assignable. In an action

¹ 21 Law J. Rep. (N. S.) Exch. 297; 7 Exchequer Rep. 780.

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by the plaintiff, as transferee of one of such bonds, the condition of which recited that the defendants had, in pursuance of the said acts, borrowed of one T. P. 5,000*l.*, for enabling them to carry the said acts into execution, the defendants pleaded that they did not borrow the said sum of the said T. P., or any part thereof, for the purposes of the said acts, and that they were not authorized to make the said bond, and that the same was made contrary to the provisions of the said acts, of which the said T. P. and the plaintiff had notice at the time the bond was made and transferred to the plaintiff:—

Held, upon general demurrer, that the plea was bad.

The defendants also pleaded, that at and before the bond was made, certain persons, namely, C. M. and W. M., were entitled to receive from the defendants, certain bonds; that the said T. P. and others conspired fraudulently to procure for T. P. one of the said bonds to which the said C. M. and W. M. were entitled, and that by means of such conspiracy and fraud they procured the said C. M. and W. M. to authorize the defendants to give to the said T. P. one of the said bonds they were so entitled to; and that the bond sued upon, was thereupon given to T. P. by the defendants, and that they the defendants, had never borrowed any sum of money from the said T. P., of all which premises the plaintiff at the time of the transfer to him of the said bond had notice:—

Held, bad on general demurrer, because the defendants could not set up as a defence the fraud that had been committed upon C. M. and W. M., by whose directions they had, in pursuance of their contract with them, given the bond to T. P.

DEBT. The declaration stated that the defendants, by their bond, sealed with their common seal, acknowledged that they, by virtue of the Westminster Improvement Act, 1845, and the Westminster Improvement Act, 1847, were bound to Thomas Pooley in the sum of 10,000*l.*, subject to a condition thereunder stated, whereby after reciting to the effect following, to wit, that by virtue of the said acts, the defendants were authorized to borrow any sum of money for the purposes of the said acts, and to secure the same by their bonds, and that the defendants in pursuance of the said acts had borrowed of the said Thomas Pooley the sum of 5,000*l.* for enabling them to carry the said acts into execution, the condition of the said bond was declared to be that if the defendants or their successors should, on the 3d of June, 1854, pay to the said Thomas Pooley, his executors, &c., the sum of 5,000*l.*, with interest at 5*l.* per cent., then the bond should be void, otherwise to remain in full force; and to the condition was annexed a proviso that it should be lawful for the defendants, their successors, or assigns, giving three months' notice to the said Thomas Pooley of their intention so to do, to pay off the said principal sum. It was then averred that the bond was duly transferred from Thomas Pooley to the plaintiff. Breach, that although 123*l.* was due for interest, which was duly demanded by the plaintiff, yet the same had not been paid, contrary to the form of the bond, by reason whereof the bond become forfeited.

The defendants pleaded, seventhly, "That they did not, in pursuance of the said acts of parliament in the said declaration mentioned, borrow of the said T. Pooley the said sum of 5,000*l.* or any part thereof, for enabling them to carry the purposes of the said acts, or any, or either of them, into execution, nor was the same lent or advanced by the said T. Pooley or any other person, for those purposes; and they further say, that the said writing obligatory was not made by the said defendants for securing the payment of any sum of money borrowed or taken up by any of the defendants for the purposes of and under the powers and provisions of the said acts, or of any or either

of them; and the defendants were not by virtue of the said acts, or any or either of them, directed, authorized or empowered to make the said writing obligatory, nor was the same made by them under or by virtue, or in pursuance of the said acts, or any or either of them, and the same was made contrary to the provisions of those acts, of which said several premises the said T. Pooley, before and at the time of the making of the said writing obligatory, had notice. And the defendants further say, that the plaintiff, before and at the time of the making of the said deed, and when the said writing obligatory was transferred to him, and when he first became the transferee of the same, had notice of the premises aforesaid. Verification.

The defendants also pleaded, eighthly, "That before the making of the said writing obligatory, to wit, on the 22d day of May, in the year of our Lord, 1851, one C. Morrison and one W. Mackenzie, were subject to certain terms and conditions, entitled to receive from the defendants certain bonds, to be thereafter issued, and made, and sealed by the defendants, under their common seal, and to be conditioned respectively for the payment by the defendants or their successors to the obligees to be named in such bonds, at the end of three years from the dates of such bonds, of divers sums of money, amounting in the whole to a large sum of money, to wit, 20,000*l.*, with interest on such sums respectively, payable half yearly. And the defendants further say, that the said T. Pooley and one A. G. Pooley, and divers other persons whose names are to the defendants unknown, afterwards and before the making of the said writing obligatory in the declaration mentioned, and of the making of the said bonds which the said C. Morrison and W. Mackenzie are so entitled to as aforesaid, or any or either of them, to wit, on the 22d of May, A. D. 1851, did conspire, combine, confederate, and agree together to obtain and acquire to the use of the said T. Pooley the said bond to which the said C. Morrison and W. Mackenzie were so entitled as aforesaid, and of the moneys to be payable thereby, and to cheat and defraud the said C. Morrison and W. Mackenzie thereof. And for that purpose they, the said T. Pooley and A. G. Pooley did, in pursuance of the said conspiracy, afterwards, and before the making of the said writing obligatory, and of the said bonds, or any or either of them, to wit, on the day and year last aforesaid, by fraud and covin, then made and practised by them upon the said C. Morrison and W. Mackenzie induce, and persuade, and cause, and procure the said C. Morrison and W. Mackenzie to contract and agree with the said T. Pooley, amongst other things, that the said T. Pooley should have, and that the said C. Morrison and W. Mackenzie should cause to be delivered to the said T. Pooley, the said bonds of the said defendants, to which the said C. Morrison and W. Mackenzie were so entitled as aforesaid. And the defendants further say, that the said T. Pooley and A. G. Pooley, in further pursuance of the said conspiracy, and by means of the said fraud and covin, and before the said C. Morrison and W. Mackenzie, and the defendants, or any or either of them, had discovered the same, or had any notice or knowledge thereof, did afterwards, to wit, on the 3d day of June, A. D. 1851, cause and procure the said

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C. Morrison and W. Mackenzie to request and direct the defendants to make and deliver, and cause and procure them to make and deliver the said bonds to which the said C. Morrison and W. Mackenzie were so entitled as aforesaid, and amongst others, the said writing obligatory in the declaration mentioned, and to make and deliver the same to the said T. Pooley as the obligee thereof in the lieu and stead of the said C. Morrison and W. Mackenzie, as the obligees thereof. And the defendants further say, that the said T. Pooley and A. G. Pooley in further pursuance of the said conspiracy, and by means of the said fraud and covin, did afterwards, to wit, on the day and year last aforesaid, cause and procure the defendants to make and deliver, and they did make and deliver the said writing obligatory in the said declaration mentioned, as, and for, and being one of the said bonds to which the said C. Morrison and W. Mackenzie were so entitled as aforesaid; and the defendants say, that they so made and delivered the same, as and for one of the said bonds to which the said C. Morrison and W. Mackenzie were so entitled as aforesaid; and the said T. Pooley took and received the same as and for one of such bonds; and they further say, that they never did at any time borrow of the said T. Pooley, nor did he lend to them the said sum of 5,000*l.*, or any part thereof, as in the condition of the said writing obligatory is recited. And the defendants further say, that the plaintiff, before and at the time of the said transfer of the said writing obligatory, had notice of the premises. And the defendants further say, that the said C. Morrison and W. Mackenzie afterwards, and before the commencement of this suit, to wit, on the 1st day of January, A. D. 1852, gave the defendants notice, and required them not to pay, and forbade them, and still forbid them paying the said moneys by the said writing obligatory so payable as aforesaid. Verification.

To these pleas the plaintiff demurred.

Joinder in demurrer.

Willes (*Garth* with him), in support of the demurrer. The seventh plea is bad, for the bond was given by the commissioners in the exercise of their discretion, and for money borrowed by them as commissioners under the several acts authorizing them, under which they are constituted, namely, 8 & 9 Vict. c. 178, and 13 & 14 Vict. c. 111. The section empowering them to borrow money is the 37th of the first-mentioned act, which provides "that it shall be lawful for the commissioners, from time to time, to borrow at interest, any sum of money which they shall judge necessary for the purposes of this act;" and the 10 & 11 Vict. c. 131, provides, "and for securing the repayment of the moneys so borrowed, with interest, the commissioners, or any three of them, may mortgage the lands or funds acquired, or to be acquired, by virtue of this act, or any part thereof, to the person who shall advance or lend such money, or his trustee, as a security for the repayment of the moneys so to be borrowed, together with interest for the same, or may secure the same by bond duly stamped." The plea admits that the money was borrowed by the commissioners, and if they thought the loan necessary, the purposes to which

they applied it cannot affect the legal rights of the obligees, who are not required to ascertain either the necessity for the loan, or the application of the money. The doctrine that trustees for public purposes are not estopped from disputing the validity of their deeds is limited by the more recent authorities to those cases where the parties with whom they have dealt were, in fact, or in point of law, held to be acquainted with the violation of the public statute. *Fairtitle v. Gilbert*, 2 Term Rep. 169; *Doe d. Levy v. Horne*, 3 Q. B. Rep. 757; s. c. 12 Law J. Rep. (N. s.) Q. B. 72; *The Queen v. White*, 4 Ibid. 101; s. c. 12 Law J. Rep. (N. s.) M. C. 31; 1 Taylor on Evidence, 82. Then, the eighth plea is also bad. It admits that Morrison and Mackenzie were entitled to receive from the defendants certain bonds, and that they directed the defendants to give one of them to Pooley, from whom the plaintiff claims as transferee. No fraud whatever was practised upon the defendants, although Pooley may have become trustee in equity for Morrison and Mackenzie, and the plaintiff, if fixed with notice of the transaction, may also be liable in equity. Fraud, to constitute a defence, must have been practised on the person promising. *Campbell v. Fleming*, 1 Ad. & E. 40; s. c. 3 Law J. Rep. (N. s.) K. B. 136. The defendants have, so far as this bond is concerned, performed their contract with Morrison and Mackenzie, and no other bond could be claimed from them if this defence were to be held good. The title of the plaintiff as against the defendants is unimpeachable. He cited also *Gorgier v. Mievill*, 3 B. & C. 45; s. c. 2 Law J. Rep. K. B. 206.

Bramwell, (*Honyman* with him,) in support of the pleas. The eighth plea is good, because it avers the plaintiff's knowledge of the fraud by the Pooleys before he acquired any title to the bond, so that he is affected with the illegality of their proceedings. The apparent right of action was obtained by an illegal conspiracy, and in accordance with the principle, "*Ex dolo malo non oritur actio*," the whole transaction is void. Broom's Legal Maxims, 571, *Pidcock v. Bishop*, 3 B. & C. 605; s. c. 3 Law J. Rep. K. B. 109; *Jackson v. Duchaire*, 3 Term Rep. 551; *Fivaz v. Nicholls*, 2 Com. B. Rep. 501; s. c. 15 Law J. Rep. (N. s.) C. P. 125; *Holman v. Johnson*, Cowp. 341; *Wright v. Tallis*, 1 Com. B. Rep. 893; s. c. 14 Law J. Rep. (N. s.) C. P. 283; *Hardman v. Willock*, 9 Bing. 382; and *Cannan v. Bryce*, 3 B. & Ald. 179. This case is similar to obtaining possession of a chattel by fraud, which clearly would give no property. The seventh plea is also good. If the commissioners really exceeded their powers, they are not estopped from setting up that defence. The question is not what they have done, but what they have done in their capacity as commissioners, which is to be determined by the extent of their powers. The principle was fully recognized in the recent case of *The East Anglian Railway Company v. The Eastern Counties Railways Company*, 21 Law J. Rep. (N. s.) C. P. 23; s. c. 7 Eng. Rep. 505, in which it was held that a railway company was not bound by a covenant entered into by them to take a lease of another railway, and pay certain costs, because those were not among the specified purposes for which they were in-

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incorporated, although the object of the covenant might be very beneficial to them. The object not being within their powers were altogether illegal. In *Gage v. The Newmarket Railway Company*, 21 Law J. Rep. (N. S.) Q. B. 398; s. c. *Ante* 57, the Court of Queen's Bench took a similar view as to a contract by a company to pay for certain land whether taken or not. In the present instance, the commissioners were trustees for public purposes, and not for profit; and the application of the moneys borrowed is specially pointed out. He referred to the 8 & 9 Vict. c. 178, ss. 3, 45, 110, and 112. Trustees with limited powers must strictly observe those powers. *Doe d. Chandler v. Ford*, 3 Ad. & E. 549; s. c. 5 Law J. Rep. (N. S.) K. B. 25. There is no estoppel, because the object of the plea is to show that the act is illegal. *Collins v. Blantern*, 2 Wils. 341, and *Paxton v. Popham*, 9 East, 408. Then, the plea sufficiently shows the illegality, for it negatives the only purpose for which money is authorized to be borrowed by the 37th section.

[MARTIN, B. Suppose the act had been obtained with a fraudulent purpose, and the commissioners had afterwards borrowed the money, would their bond be void? It is not alleged in the plea that Pooley, at the time of lending the money, knew that it was not to be used for the purposes of the act, but for other and illegal purposes.]

That sufficiently appears on general demurrer. But even if the money had been properly borrowed, the commissioners had no right to make a bond to another person absolutely, although they might do so to him as trustee for the lender.

Willes, in reply. The allegation of fraud in the eighth plea does not give any right to the defendants. They were not defrauded in any way, and payment to Pooley or his transferee would be a good defence against Morrison and Mackenzie. They cannot set up a fraud upon third persons as justification for their own breach of contract. *Cary v. Kearsley*, 4 Esp. 168; *Taylor v. Croker*, *Ibid.* 187; *Smith v. Cuff*, 6 M. & S. 160; and *M'Kinnell v. Robinson*, 3 Mee. & W. 434; s. c. 7 Law J. Rep. (N. S.) Exch. 149. As to the seventh plea, *Hill v. The Proprietors of the Manchester and Salford Waterworks*, 2 B. & Ad. 544; s. c. 1 Law J. Rep. (N. S.) K. B. 230, is decisive. There a company, authorized by act of parliament to raise money for certain purposes, gave a bond purporting to be for a sum borrowed and advanced conformably to the act, and a plea that it was executed colorably, and that the money was not in fact borrowed or lent for the purposes of the statute, as the obligee well knew, was held bad, no fraud or injury done to the shareholders in the company being shown. He referred also to *Doe d. Jones v. Jones*, 5 Exch. Rep. 16; s. c. 19 Law J. Rep. (N. S.) Exch. 284.

POLLOCK, C. B. We are all of opinion that the plaintiff is entitled to judgment. Neither of the pleas demurred to presents a legal answer to the claim. The bond was properly executed and properly transferred. Then, one plea says that the bond was procured by the fraud of the Pooleys, and the other that the defendants had no power

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to give this bond, and that they are, therefore, not bound by it. In the first place, it does not appear that the commissioners did not borrow the money thinking it right and necessary at the time, which would be quite sufficient to make the transaction valid. As to the defence of fraud, I think the defendants cannot set up fraud practised on other parties and not upon themselves. The contract is good on its face, and the commissioners were bound to give the bond to some one. It is said that they were induced to give it to the wrong parties, but this was done by the authority of the parties entitled to the bond. The rights of the parties must be settled in equity.

ALDERSON, B. I am of the same opinion on both points. The defendants cannot set up any fraud practised on Morrison and Mackenzie, who had no legal title to the bond after they had authorized the defendants to give it to Pooley. It may be voidable in equity, or Pooley may have been a trustee for Morrison and Mackenzie, but it is no defence against the holder of the bond.

PLATT, B. The seventh plea is bad on general demurrer. It states that the money was not borrowed for the purposes of the act, but it does not deny that "the commissioners judged it necessary for the purposes of the act," and that is the description of the power to borrow mentioned in the act. As to the eighth plea, the bond is not void as between Pooley and the defendants. The nomination of Pooley was valid when given and acted upon by the defendants, and is the bond to remain unpaid because there was a conspiracy between other parties? If Morrison and Mackenzie had sued, the defendants would have said they had given the bond to Pooley pursuant to their direction, and now, when the bond is sued upon, this fraud is set up. The remedy is in equity, and in equity only.

MARTIN, B. Both the pleas are clearly bad. The deed states that the money was borrowed for the purposes of the acts, and the plea denies that which is thus stated in the deed. It is contended that the law of estoppel does not apply. But an estoppel, as between the parties to the bond is, that for that transaction there is an end to the inquiry. [His lordship referred to *Bonner v. Wilkinson*, 5 B. & Ald. 682.] The rule is not indeed applicable if the facts alleged are intended to cover illegality by false averments; but that is not the case in this instance, and I think that there is an estoppel as to all the facts recited, unless it has been done for a distinct illegal purpose. The plea is substantially the same as in *Hill v. The Proprietors of the Manchester and Salford Waterworks*, and I think that decision is good law. As to the eighth plea, it carefully avoids alleging any fraud upon the defendants. It is only that by means of fraud on Morrison and Mackenzie, who were entitled to the bond, it was obtained by Pooley. That is no defence to this action.

Judgment for the plaintiff.

PORCH v. CRESSWELL.¹

June 5, 1852.

Practice — Several Pleas — Traverse of Excuse for Profert.

A traverse of excuse for profert may be pleaded with other pleas in bar.

THIS was a rule calling upon the plaintiff to show cause why the defendant should not be at liberty to plead the several matters following; first, *non est factum*; secondly, a traverse of the deed being in the defendant's possession; thirdly, payment by the defendant; fourthly, cancellation of the deed by the plaintiff.

The action was in covenant on a mortgage deed, the declaration alleging as an excuse for profert that the deed was in the possession of the defendant. The second plea had been disallowed by a judge at chambers.

Milward showed cause. The second plea has been disallowed at chambers, and the court will not interfere with the discretion of the judge.

[POLLOCK, C. B. The granting or refusing over is not matter of discretion; if the court is wrong a writ of error may be brought.]

The second plea is inconsistent with the plea of cancellation, since, if the latter plea be true, the defendant would be in possession of the deed.

[MARTIN, B. If the second plea is not allowed, the statement on the record that the deed was in the defendant's possession would remain uncontradicted. According to my experience, the plea has always been allowed.]

It is contrary to principle to allow a plea which goes only to the suspension of the action to be pleaded with a plea in bar. This is, in effect, a plea in abatement.

[POLLOCK, C. B. The reason why a plea in abatement cannot be pleaded with a plea in bar is merely technical. Why should not these pleas be allowed as well as any other two pleas which are inconsistent, such as payment and the Statute of Limitations? Why should not the defendant go to trial and succeed on other pleas, although he may fail on this?]

Willes, in support of the rule, cited and referred to *Read v. Brookman*, 3 Term Rep. 151, Com. Dig. "Pleader," O, 1, Co. Litt. 226; *Beckford v. Jackson*, 1 Esp. 337, and *Smith v. Woodward*, 4 East, 585.

Per Curiam.² The rule must be absolute.

Rule absolute.

¹ 21 Law J. Rep. (N. S.) Exch. 301.

² POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

THE GALVANIZED IRON COMPANY v. WESTOBY.¹

June 26, 1852.

Joint-stock Company—Shareholder, who is—7 & 8 Vict. c. 110, s. 26.

The defendant applied for, and obtained, shares in a projected company, the capital of which was to consist of 500,000*l.* in 50,000 shares, and paid the deposits thereon. The company was completely registered under the 7 & 8 Vict. c. 110, and the defendant's name was entered as a shareholder in the register of shareholders and in the schedule to the deed of settlement, but he never executed the deed of settlement, or any deed referring to it. The full amount of capital never was subscribed, but the company began business with less; but not succeeding, a private act of parliament was passed for the purpose of winding up the concern. This act recited the deed of settlement, and the facts as to the deficiency in the subscribed capital, and authorized the directors to make calls upon the shareholders and bring actions to recover such calls, and enacted that in such actions it should be sufficient to prove that the defendant was a holder of shares at the time of the call, and that the production of the register of the shareholders of the company should be *prima facie* evidence of the number of shares held by him. It also enacted, that except as otherwise provided by the act, every such call should be made according to the deed of settlement, and as regarded the liabilities of the shareholders, the forfeiture of shares, and otherwise, should be deemed to have been made under such provisions; and also that nothing in the act contained, except as therein expressly enacted, should render any shareholder or other person liable to the company, if such shareholder or other person would not have been liable thereto if the act had not passed:—

Held, in an action for a call under the private act, that the defendant was not liable as a shareholder or otherwise, as he had not executed the deed of settlement, or any deed referring thereto, and the private act only extended to such shareholders:—

Held, also, that even had the private act extended to persons who had agreed to take shares, he would not have been liable, as the acceptance of the shares was conditional upon the full capital being subscribed, and this condition had not been performed or waived.

DEBT for a call of 2*l.* per share on 100 shares, with-interest from the 18th of August, 1848, held by the defendant in the Galvanized Iron Company.

Plea, that the defendant was not the holder of the shares at the time of the call made. Issue thereon.

At the trial before Pollock, C. B., at the sittings after Michaelmas term 1851, it appeared that the defendant had accepted and paid the deposit on 100 shares in the Galvanized Iron Company, the capital of which was to consist of 500,000*l.* in 50,000 shares. He, however, never signed the deed of settlement or any other deed referring to it, but his name was duly entered in the register of shareholders, and mentioned in the schedule to the deed of settlement as the holder of the shares. Several calls were made, but the defendant paid none of them, and took no part in the affairs of the company. In 1848 the company became embarrassed, and on the 22d of July in that year, an act passed (11 & 12 Vict. c. 103) to enable the directors to wind up their affairs, and for that purpose they were authorized to make certain calls on the shareholders. Under this act a call of 2*l.* per share was made on the 24th of July, and for that call this action was brought.

¹ 21 Law J. Rep. (N. S.) Exch. 302; 16 Jur. 892; 8 Exchequer Rep. 17.

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A verdict was returned for the plaintiffs for 233*l.* 6*s.* 8*d.*, with leave reserved to the defendant to move the court to enter a nonsuit, on the ground that the defendant was not liable as a shareholder, or in any other character.

A rule *nisi* was obtained accordingly, against which

The *Attorney-General* (*F. Thesiger*) and *Willes* showed cause,¹ and

Crowder and *Milward* were heard in support of the rule.

The various clauses of the private act of the 7 & 8 Vict. c. 110, relied upon in the argument, are fully stated in the judgment.

Hutton v. Thompson, 3 H. L. Cas. 161, *Sutherland v. Wills*, 5 Exch. Rep. 715, and *Pitchford v. Davis*, 5 Mee. & W. 2; s. c. 8 Law J. Rep. (N. S.) Exch. 157, were also cited.

Cur. adv. vult.

Judgment was now delivered by

PARKE, B. In this case the point reserved on the trial before my Lord Chief Baron was, whether the defendant was a shareholder and liable to contribute to the debts of the company under the private act, the 11 & 12 Vict. c. 103, passed for the purpose of winding up the affairs of the company. He had applied for and obtained an allotment of shares; he had paid the deposit upon them, but he had not executed the deed of settlement of the company or any deed referring to it. The capital of the company was to consist of 500,000*l.* in 50,000 shares. The defendant applied for and obtained shares; that amount never was subscribed, but the company began business with less, and not succeeding, a private act of parliament, the 11 & 12 Vict. c. 103, was passed for the purpose of winding up the concern. That act recites the deed of settlement, and that at the time of its execution the number of shares taken out was not 50,000 but 45,407 only, of which 25,000 were considered as fully paid up and the rest in part only; that the company was completely registered and 51,652*l.* remained unpaid on the 45,407 shares; that in consequence of an irregularity in the proceedings of the company and the directors, doubts were entertained as to the power of the company to enforce without expensive litigation the payment of the total amount remaining unpaid; that the company was in pecuniary embarrassment, and it had become necessary to wind it up; that in the present state of the affairs of the company, the liability of each shareholder exceeded the nominal amount of the shares, and that in the deed of settlement no provision was made for the existing condition of the company, and it was necessary to wind up their affairs.

The act proceeds to enact that the company shall be dissolved; that the 20,407 shares mentioned in the second schedule, remaining, shall be paid up; and it provides by section 29, that the directors

¹ April 29, before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

The Galvanised Iron Company v. Westoby.

may, when they think fit, call for and compel payment of the sums of money as instalments of capital in respect of the 25,000 and the 20,407 shares as they shall think necessary at certain intervals. Then follows the 30th section, enacting, that, except by that act otherwise provided, every such call shall be made according to the provisions of the deed of settlement, and as regards the liabilities of the shareholders, the forfeiture of shares and otherwise shall be deemed to have been made under such provisions.

Another clause, the 32d, provides, that if at the time appointed, any shareholder shall fail to pay the call, the company may sue such shareholder, and the form of declaration is given. It is enacted by section 34, that at the trial it shall be sufficient to prove that the defendant was a holder of shares at the time of the call, and by section 35, the production of the register of the shareholders of the company shall be *prima facie* evidence of the number of shares; and at the end there is this proviso, — “Provided always and be it enacted, that this act or any thing therein contained shall not, except so far as is therein expressly enacted, render liable to any creditor of the company, or any person having or alleging any claim or demand against the company, the company or any shareholder or other person, if the company or such shareholder or other person would not have been so liable if this act had not been passed, or render liable to any call, contribution, debt, claim, or demand, the company or any shareholder or other person, if the company or such shareholder or other person would not have been liable thereto if this act had not been passed.” It appears from the deed itself, that amongst the subscribers holding shares, parcel of the 20,407, in the second schedule mentioned, is the defendant's name, and if the statute had enacted that those who are named as shareholders in the second schedule should be compelled to pay, this express enactment, however unjust, would have rendered the defendant liable, and he would not have been exempted, though otherwise not liable under this clause. But there is no such express enactment, and it would be certainly most unjust if there had been; nor is it implied, that those named in the deed as shareholders who did not execute it should be obliged to pay. The statute enacts that the directors should call for money by instalments on so many, both of the 25,000 and the 20,407 shares, as shall exist, and makes the shareholder, that is, the real shareholder, who fails to pay such calls, liable to an action, but it leaves the question open — who is a shareholder?

Who, then, is such a shareholder? In the interpretation clause (section 5) the word “shareholders” is declared to mean shareholders of the company, and to include former shareholders and their representatives. By the act, the 7 & 8 Vict. c. 110, under which the company was completely registered, the word “shareholder” is, by the interpretation clause (section 3) declared to mean any person entitled to shares in any company who has executed the deed of settlement or any deed referring to it, and this meaning it is to bear so far as it is not excluded by the context or by the nature of the subject-matter. By section 25, the shareholders are incorporated, and section 55 gives

a remedy to recover calls against the shareholders. Under this act of parliament a shareholder, therefore, must be one who has subscribed the deed of settlement, or one referring to it, unless there is something in the context to give a different meaning; and, certainly, there is nothing in that clause to give a different meaning. But in the 26th section there is a provision that "no shareholder of any joint-stock company, completely registered under this act, shall be entitled to receive any dividends or profits, or be entitled to the remedies or powers hereby given to the shareholders, until he shall have executed the deed of settlement of the said company, or some deed referring thereto, and also have paid up all instalments or calls due from him, and shall have been registered in the registry office aforesaid." In this last section the word "shareholder," by reason of the context, may have a different interpretation, but not in the other part relating to the enforcement of calls.

The argument used by the Attorney-General that this clause shows that "a shareholder" may be liable to calls before he has executed the deed, does not appear to us to be of any weight; the meaning is, that a shareholder who has executed must, nevertheless, pay the calls before he is entitled to a share of the profits. From these references to the act of parliament, it is no doubt clear that there was a *prima facie* case against the defendant of his being a shareholder within the meaning of the private act, as his name appeared in the register, which is made *prima facie* evidence. But we think that, on the facts in proof in this case, that *prima facie* case was rebutted, and the defendant was not a shareholder liable to calls under the private act; first, because that act applies to "shareholders" only, and "shareholders" are, by the general act, the 7 & 8 Vict. c. 110, those who have executed the deed or any deed referring to it; and by section 13 of the private act the liability of the shareholder to calls is to be according to the deed of settlement, which could attach to those only who signed it. And, again, the private act expressly provides that no one shall be made liable by it who would not have been liable if the act had not passed, that is, provided there is no expressed enactment; and, as I have before said, it appears to us there is not. By the general act, shareholders only, that is, those who executed the deed, or any deed referring to it, were liable. The object of the private act appears to us to be merely to give greater effect to the provisions of the deed, and extend its operation against the parties to it only. As it appears by the evidence in this case that the defendant never did execute the deed, and, therefore, was not a shareholder in the proper sense, the *prima facie* evidence of the register is rebutted.

But, secondly, if this view of the construction of the private act be wrong, and it extends to shareholders, that is, subscribers or persons who have taken shares, and who have not executed the deed, we are still of opinion that the defendant is not liable. This agreement to take shares in a concern which was to have a capital of 500,000*l.* is, upon the authority of many cases, *Pitchford v. Davis* among others, a conditional contract, that is, provided that that capital is subscribed

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for; and unless that condition is performed or waived, the defendant is not a shareholder in the sense of a person having agreed to take shares. Then, although the register is *prima facie* evidence that the defendant was a shareholder, the fact of the agreement to take shares having been conditional is proved in this case, and also the non-compliance with that condition, for the private act shows that less than 50,000 shares were taken. This proves that he was not bound to take the shares unless the plaintiffs proved affirmatively that the defendant waived the condition and agreed to take shares in a concern with a less capital than 500,000*l.*, which, certainly, was not done. We think that the rule to enter a nonsuit should be absolute.

This is the judgment of my lord chief baron, my brother Alderson, and myself. My brother Martin is not entirely satisfied with it; he still entertains some doubt about the propriety of this judgment, principally on the ground that he thinks it may be inferred from the private act that the legislature meant that those whose names were in the second schedule should be all obliged to pay.

Rule absolute.

FULLER and others v. EARLE.¹

June 5, 1852.

Judgment — Order of Judge Charging Shares — 1 & 2 Vict. c. 110, s. 14 — Shares, Deposit and Transfer of — Equity.

The defendant being the registered owner of 200 shares of a joint-stock company deposited the certificates thereof with E., as a security for money advanced. He afterwards borrowed a further sum from an insurance office, of which C. was a director, and E. and C. being sureties for the repayment of that sum, he executed according to the Joint-stock Act a transfer to C. of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. Judgment for the recovery of the sum advanced having been obtained by the insurance office, and a judge's order *nisi* to charge the shares having been made, C. subsequently requested the joint-stock company to transfer the shares into his name, which they refused, and the shares remained standing in the name of the defendant.

The court made the judge's order absolute, holding that the shares were to be considered as standing "in the defendant's name in his own right," within the meaning of the 1 & 2 Vict. c. 110, s. 14, and that the relief of the creditors was in equity.

This was an application, on the part of the plaintiffs, being judgment creditors, to the court, to confirm an order of Martin, B., whereby 200 shares in a joint-stock company, called the Professional Life Assurance Company, were charged with payment of a judgment debt due to the plaintiffs. The case having come on, at chambers,

¹ 21 Law J. Rep. (N. S.) Exch. 314; 7 Exchequer Rep. 796.

before Pollock, C. B., was by him referred to the Master, who made the following report.

The Professional Life Assurance Company is a joint-stock company, which was completely registered under the 7 & 8 Vict. c. 110, the shares being transferable, pursuant to the act and the deed of settlement. In June, 1848, the defendant obtained from a Mr. Elderton, who had been his attorney, a loan of 100*l.*, to enable him to purchase 200 original shares in the company. He was then and is still indebted to Mr. Elderton, in an amount which, together with this 100*l.* exceeds the present value of his shares. The 100*l.* was advanced by Mr. Elderton in 1848. The 200 shares were thereupon allotted to the defendant, and were entered in his name in the books of the company. The certificates of these shares were at the same time deposited by the defendant with Elderton as a security for the entire amount due to him, and they have remained in his custody ever since. In August, 1850, notice not to part with these shares was given by John Elderton to the company. In June, 1851 (for the purpose of paying part of his debt to Mr. Elderton), the defendant, through Elderton, negotiated a loan of 175*l.* from the Age Life Assurance Company, in which, at the same time, he insured his life, and Elderton and Mr. Cockell, a director of the last-mentioned office, who was aware of the object of the loan, as sureties for the defendant, joined with him in a bond to the office conditioned for the repayment of the loan and insurance premiums by instalments, and by which, in the event of any instalment not being paid, the whole amount was to become due. The defendant at the same time, as an indemnity to Cockell, with the consent of Elderton, executed a transfer of the 200 shares in the Professional Life Assurance Company to Cockell, in the form prescribed by the 7 & 8 Vict. c. 110. He also signed a declaration to accompany the same, stating the times of the transfer, and delivered them both to Cockell, it being also understood at the time, between Elderton and Cockell, that should the latter ultimately sustain any loss, he should be indemnified by the former. Upon the second instalment, under the bond, becoming due in December last, it was not paid by the defendant, and Elderton and Cockell thereupon received a notice from the Age Office claiming the whole amount of the bond from them. On the 4th of February last, Cockell lodged the transfer to him of the 200 shares at the office of the Professional Life Assurance Association and requested the officer to transfer the shares into his name; which the officer refused to do on the ground that he had been previously served with a copy of the order of Martin, B., and had also previously received the notice from Mr. Elderton before mentioned. The shares are, therefore, still standing in the books of the company in the name of the defendant.

Under these circumstances, if your lordships should be of opinion that the shares were chargeable in these actions at any time before a transfer was made in the books of the company, I do report that there were at the time of the making of the said order of Martin, B., 200 shares to which this said order could apply. But if your lord-

ships should not be of that opinion, then I do report that there were not at the time of the making of the last-mentioned order any shares to which the same could apply.

D. Keane showed cause on behalf of *Cockell*. The order for charging the shares ought not to have been made, and must be discharged. The question turns upon the meaning of the 14th section of the 1 & 2 Vict. c. 110, which empowers a judge, on the application of a judgment creditor, to charge with the payment of the amount of a judgment any shares of a judgment debtor, "standing in his name, in his own right, or in the name of any person in trust for him." Some light is thrown upon the meaning of these words, by the language of the 7 Geo. 2, c. 8, s. 8, which speaks of stock standing in "their own right," or "their own name," thus drawing a distinction between the two cases. The words, "standing in his own right," refer to property of which the party is the absolute owner. The words, "in his own right," are to be found in the 88th section of the 1 & 2 Vict. c. 110. The 125th section of the same act also illustrates this view of the case. In like manner the words of the 89th section, "for his use and benefit," assist in the interpretation of the section in question. The defendant, *Earle*, has transferred the property in the shares to *Mr. Cockell*; he further has parted with the certificates of them, he has, therefore, done every thing to take the property out of himself. The 52d section of the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, makes the certificate *prima facie* evidence of the title of the shareholder to the share. The 54th and other sections may be relied on by the other side; but these clauses were enacted merely for the protection of the several companies. He referred to *Robinson v. Burbidge*, 19 Law J. Rep. (N. S.) C. P. 242; s. c. 1 L. M. & P. 94; *Fortescue v. Barnett*, 2 Myl. & K. 36; s. c. 2 Law J. Rep. (N. S.) Chanc. 106; *Burnes v. Pennell*, 2 H. L. Cas. 497; *London and Brighton Railway Company v. Fairclough*, 2 Man. & G. 674; s. c. 10 Law J. Rep. (N. S.) C. P. 133; *Doe d. Hull v. Greenhill*, 4 B. & Ald. 684; *Smith v. Smith*, 2 Cr. & M. 231; s. c. nom. *Smith v. Masterman*, 3 Law J. Rep. (N. S.) Exch. 42. This is a case of reputed ownership. *Nelson v. The London Assurance Company*, 2 Sim. & S. 292, and *Ex parte Watkins*, 2 Mont. & Ayr. 348.

Bovill, for *Elderton*. The 14th section of the 1 & 2 Vict. c. 110, does not apply, and no order to charge stock can be made where it stands in the name of the party himself, and also another. That section is intelligible if it is made to apply to that property only in which the party is interested. There was a *bona fide* debt due from *Earle* to *Cockell* and *Elderton*, and the latter are equitable mortgagees. The phrase, "standing in his name in his own right," means standing in his own sole right.

M. Smith, for the plaintiffs, was not called upon.

 Fuller v. Earle.

MARTIN, B.¹ This order for charging the stock must be made absolute. The defendant appears on the register of the company, as the owner of the shares. He has power to transfer the shares in a certain specified mode, but until his name is erased from the register of shareholders, he is bound to pay all calls and entitled to all the benefits belonging to the shares. The question is, whether these shares are standing in the defendant's name in his own right. If he were a trustee merely, and had been so originally, a doubtful question might arise. Here the defendant is entitled to the shares as against every one. Then a creditor obtains a judgment, and desires to be put in the same situation as the debtor. If the shares are not sufficient to satisfy the claim, the debtor gets nothing; but if they are sufficient to pay the charge of the creditor, the debtor is entitled to the surplus so standing in his name. The decision works no hardship to the clients of Mr. Bovill and Mr. Keane, except in this respect, that it is hard that they should be drawn into equity for the purpose of obtaining relief. The 15th section of the 1 & 2 Vict. c. 110, confirms this view of the case, as it enacts that no disposition of stock, as shares by a judgment debtor, after a conditional order has been obtained, shall be valid as against a judgment creditor. The case referred to, which was decided upon the Statute of Frauds, was different, as in that case there was another trust to be performed with reference to the property taken in execution. The objects of the Stock-jobbing Act are also very different from the statute in question. The intention of that act was to provide that the party who might sell the stock should have dominion over the thing that he sold. Again, the reputed ownership in the Bankrupt Act, which has been referred to, has no bearing on the point, or if it has, it is in favor of the plaintiffs. The words in the 88th and 89th sections of the 1 & 2 Vict. c. 110, although somewhat similar to the language of the 14th section, are yet used in a different sense. The decisions of *The London and Brighton Railway Company v. Fairclough* and *Barnes v. Pennell*, are, no doubt, quite correct.

M. Smith asked for costs, citing *Dempster v. Earl of Glengall*, 4 Irish Jurist, 20.

MARTIN, B. The rule will be absolute, without costs.

Rule absolute, without costs.

¹ His lordship sat apart from the rest of the court.

Freegard v. Barnes and Barton.

FREEGARD v. BARNES AND BARTON.¹

June 3, 1852.

Trespass or Case — False Imprisonment — County and Parish Constable — Warrant, Construction of — 24 Geo. 2. c. 44, s. 8.

Trespass for false imprisonment. The defendant Barnes having obtained a warrant to search the plaintiff's house, and to apprehend him on a charge of felony, the warrant being headed "To the constable of D., in the county of W.," delivered it to the defendant Barton, a county constable, appointed under the 2 & 3 Vict. c. 93, who executed it within the parish of D., by apprehending the plaintiff. The action was not brought until the expiration of six months from the time of the act committed : —

Held, first, that trespass was the proper form of action ; secondly, that the parish constable of D., and not the defendant Barton, was the proper party to execute the warrant, but that Barton was protected, the action not having been brought against him within six months, pursuant to the 24 Geo. 2, c. 44, s. 8, and that the other defendant was liable.

TRESPASS, for assaulting and imprisoning the plaintiff.

Plea — Not guilty by statute.

At the trial, before Talfourd, J., at the last Wiltshire spring assize, the facts were as follows : — The plaintiff was an inkeeper residing at Dauntsey, in Wiltshire ; the defendant, Barnes, was a wharfinger living in the same place ; and the other defendant, Barton, was a county police constable, appointed under the 2 & 3 Vict. c. 93, s. 8, and was attached to the district in which Dauntsey was situated. The defendant, Barnes, having lost two lamps, applied for, and obtained a warrant, to search the premises of the plaintiff, and also to apprehend him. The warrant, which was headed " Wilts, to wit," was directed " To the constable of Dauntsey, in the said county, and was delivered by Barnes to Barton to be executed." The policeman, Barton, having proceeded to the plaintiff's premises, and obtained the lamps from the plaintiff's wife, afterwards, on being told by the other defendant to do his duty, apprehended the plaintiff, and took him before a magistrate, by whom he was discharged. The defendants justified under the 1 & 2 Will. 4, c. 41 ; 2 & 3 Vict. c. 93 ; 3 & 4 Vict. c. 88 ; and 21 Jac. 1, c. 12.

The action not having been brought until after the expiration of six months from the act committed, it was contended on behalf of the defendants, that the action had been brought too late with reference to the 24 Geo. 2, c. 44, s. 8, and that the plaintiff ought to be nonsuited. The learned judge was of that opinion, and a nonsuit was entered, leave being reserved to the plaintiff to move to enter a verdict for him for 15*l*.

Kinglake having obtained a rule *nisi* accordingly, cause was shown by —

Crowder and *Hodges*, for Barnes, and by *Slade*, for Barton. First

¹ 21 Law J. Rep. (N. S.) Exch. 320.

the action ought to have been case and not trespass. *Elsee v. Smith*, 1 Dowl. & Ry. 97; *Barber v. Rollinson*, 1 Cr. & M. 330; s. c. 2 Law J. Rep. (N. S.) Exch. 101; *Brown v. Chapman*, 6 Com. B. Rep. 365; s. c. 17 Law J. Rep. (N. S.) C. P. 329; and *West v. Smallwood*, 3 Mee. & W. 418; s. c. 7 Law J. Rep. (N. S.) Exch. 144. Secondly, it will be contended, on behalf of the plaintiff, that the warrant was bad, and afforded no justification to the defendants, inasmuch as it was directed to the constable of Dauntsey, which means the parish constable, and that it could not lawfully be executed by the defendant, Barton, who was a county, and not the parish, constable of Dauntsey. Both defendants, however, are protected; for the defendant, Barnes, was acting in aid of the constable, who was thought by him to be the proper party to execute the warrant, and the defendant, Barton, also, reasonably and *bonâ fide* thought he was entitled to execute it, and having so acted, was entitled to the protection of the 24 Geo. 2, c. 44, s. 8, which enacts that actions must be brought against constables and others within six months "from the act committed."

Kinglake, Serg., (*F. Edwards* with him), in support of the rule, was stopped as to the point relating to the form of the action. The questions in this case are, whether the defendants are entitled to the protection of the statute, and what is the true construction of the warrant. This warrant is directed to the constable of Dauntsey; that means the parish constable of Dauntsey. The defendant Barton, therefore, who was a county constable, was not entitled to execute it. In *The King v. Weir*, 1 B. & C. 288, the law was laid down, that if a warrant be directed to a constable by name, he may execute it anywhere within the jurisdiction of the magistrate, but if it is delivered to him by his name of office, he can execute it only in the parish of which he is a constable. In the present case, the defendant Barton, being a county constable, was not authorized to act at all; at all events, the other defendant Barnes is liable. He cited and referred to 5 Geo. 4, c. 18, s. 6, 11 & 12 Vict. c. 42, 5 & 6 Vict. c. 109, 2 & 3 Vict. c. 43, s. 8, 3 & 4 Vict. c. 88, s. 27, and *Parton v. Williams*, 3 B. & Ald. 330.

ALDERSON, B. I think this rule ought to be made absolute against the defendant Barnes, and that my brother Kinglake must give up the rule as regards the defendant Barton. The parties ought to have followed the direction of the warrant, which shows that the parish constable was the proper party to execute it. The defendant Barton is nevertheless within the protection of the act, 24 Geo. 2, c. 44, s. 8, which requires that actions against constables shall be brought within six months from the time of the act committed. It is sufficient if the constable means to act under the warrant, and does not intend to use it colorably.

PLATT, B., concurred.

MARTIN, B. I am of the same opinion. The 11 & 12 Vict. c. 42, s. 12, leaves no doubt on the point. The defendant Barton, in one

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sense, answered the description in the warrant, as it was directed to the constable in Dauntsey, in which district he had authority as a constable. The other defendant was not constable of Dauntsey at all. The party who executes the warrant ought to be the person who appears on the face of it to have authority to execute it. But the defendant Barton is nevertheless entitled to the protection of the statute.

Rule absolute accordingly.

GRINHAM and another v. CARD and others.¹

May 22, 1852.

Friendly Societies Act, 13 & 14 Vict. c. 115, s. 22 — County Court, Jurisdiction of — Arbitration.

By the 32d rule of a friendly society established in 1836, it was provided, that if any dispute should arise between any officers of the society, or between any other members and any officer, it should first be referred to the committee, and if their decision should not be satisfactory, then to arbitrators, pursuant to the 10 Geo. 4, c. 56, s. 27. In 1839, a reserved fund, consisting of subscriptions, was established, and was regulated by a new rule, called the 38th rule, which provided that every dispute should be referred to arbitration in the manner provided by the rule of the society. In 1850, this rule was expunged. The Friendly Societies Act, 13 & 14 Vict. c. 115, s. 22, enacts that if any dispute shall arise between the members or person claiming under or on account of any member of any society established under this act, and the trustees, &c., or committee, it shall be settled as the rules of the society shall direct; but if the dispute be such that, for the settlement of it, recourse must be had to a court of equity, it may be referred to the judge of the county court. An action having been brought in the county court by the committee of the society against the trustees to recover the amount of the reserved fund:—

Held, that this was a dispute provided for by the 27th section of the 13 & 14 Vict. c. 115, and that it might be referred to arbitration under the 32d rule of the society; that it was not a dispute requiring to be settled by a court of equity; that the county court, therefore, had no jurisdiction, and a writ of prohibition ought to be awarded.

This was a rule calling upon the plaintiffs in the county court, to show cause why a prohibition should not issue to the judge of the County Court of Kent, at Tunbridge Wells, to stay all further proceedings in a plaint of *Grinham and another v. Card and another, Trustees of the Frant Friendly Society*.

By the 32d rule of that society, which was established in 1836, it was directed, "that if any dispute or difference shall arise between any officers of this society, or between any other member and any officer or officers, it shall be first referred to the committee, or such of them as shall not be personally interested therein, and if the decision of such committee shall not be satisfactory to all parties concerned, then reference shall be made to arbitrators, pursuant to the 10 Geo. 4, c. 56, s. 27." In 1839, a fund, called the reserved fund, was established, con-

¹ 21 Law J. Rep. (N. S.) Exch. 321.

sisting of the accumulation of subscriptions of honorary members. The application of this fund was regulated by a new rule called the 38th rule. In 1847, this rule was altered, and the application of the trust fund was also altered, payments being directed by it to be made pursuant to a certain scale. It also directed, "that if any difference or dispute shall arise touching this fund, or the construction of this rule, the same shall be referred to arbitration in the manner specified by the rule of this society." On the 10th of July, 1850, this 38th rule was expunged, and a different distribution made of the reserved fund. A similar alteration was made on the 12th of August, 1850. The Friendly Societies Act, 13 & 14 Vict. c. 115, s. 22, enacts, "that if any dispute shall arise between the members, or person claiming under or on account of any member, of any society or branch establishment under this act, and the trustees, treasurer, or other officer or committee thereof, it shall be settled in such manner as the rules of the society or branch shall direct, and the decision so made shall be binding and conclusive; but if such dispute shall be of such kind that, for the settlement of it according to the laws now in force, recourse must be had to one of her majesty's courts of equity, or to the Court of Session, it may be referred at the option of either party to the judge of the county court," &c. The action was brought in the county court by the members of the committee of the Frant Friendly Society, to recover from the defendants, who were trustees of the same society, the sum of 186*l.*, being the reserved fund in their hands. The trustees refused to part with the fund, alleging that they were not authorized so to do. The judge of the county court gave judgment for the plaintiffs for the whole amount claimed, whereupon the present rule for a prohibition was obtained.

Hawkins showed cause. This question arises upon the 22d section of the 13 & 14 Vict. c. 115, which enacts, "that if any dispute shall arise between the members, or person claiming under or on account of any member, of any society, or branch established under this act, and the trustees, treasurer, or other officer or committee thereof, it shall be settled in such manner as the rules of such society or branch shall direct, and the decision so made shall be binding and conclusive; but if such dispute be of such a kind that, for the settlement of it according to the laws now in force, recourse must be had to one of her majesty's courts of equity, it may be referred at the option of either party to the judge of the county court." The present is not such a dispute as could be "settled as the rules of the society shall direct," because the 38th rule, which directs that disputes shall be referred to arbitration, has been expunged by the rule of the 12th of August; and the defendants cannot fall back upon the 32d rule, because that rule was made in 1836, at which time the reserved fund had no existence, not having been created till 1839.

[ALDERSON, B. The parties may go back to the 32d rule of the society, which directs, that in case a dispute shall arise between any officers of the society, or between any other member or any officer, it shall first be referred to the committee, and then to arbitration, pursu-

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ant to the 10 Geo. 4, c. 56. Here is a general power given to settle all disputes, present and future. No matter is to go to the county court judge but what belongs to a court of equity. That is clear from the 22d section. Why, then, need the parties have gone into the county court at all?]

In this case the committee are the plaintiffs in the county court, and are parties to the dispute. The matters in difference cannot be referred to themselves. This is not such a dispute as is contemplated by the 32d rule. No action at law could be maintained between these parties. Their only remedy would be in equity, and that being the case, the county court has jurisdiction.

Honyman, contra, was not called upon.

Per Curiam.¹

The rule must be absolute; but the question being one of some nicety, and it being the case of an appeal against the decision of a judge, there will be no costs.

Rule absolute, without costs.

MICHESON v. NICOL.²

June 5, 1852.

Ship and Shipping — Freight — Charter-Party — Agent — Taking to Goods.

The defendant chartered a ship to bring from Bombay, at 3*l*. 5*s*. per ton, a cargo, not being his own, but for the purpose of making a profit on an increased rate of freight. The defendant's agents filled the carrying part of the vessel and then the cabin with their own goods, which were consigned to the defendant, as their factor, for sale. There was contradictory evidence as to the amount to be paid for the cabin freight. The defendant refused to pay the plaintiff more than 3*l*. 5*s*. per ton for the freight of the cabin goods, but had charged his agents with the payment of 7*l*. per ton, and had allowed them commission at that rate. The goods having been stopped for the non-payment of a bill of exchange, given in respect of them, the defendant, after the commencement of the action, the bill having been paid, obtained possession of the goods: —

Held, first, that the judge rightly directed the jury that, although the defendant's agents at Bombay had no authority to put the goods into the cabin, yet if they did so, and the defendant on the ship's arrival took to them and received the freight, he was bound to pay the plaintiff the current freight, and was not confined to the charter freight of 3*l*. 5*s*. per ton: and, secondly, that the action was not brought too soon, for that the taking to the cabin cargo for the purpose of obtaining the freight rendered the defendant liable irrespective of the possession obtained after action brought.

ASSUMPSIT to recover the sum of 336*l*. 17*s*. 4*d*. for the freight of goods from Bombay to London.

¹ POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

² 21 Law J. Rep. (N. S.) Exch. 323.

The defendant pleaded, except as to 156*l.* 18*s.*, *non assumpsit*, and as to 156*l.* 18*s.* payment into court.

At the trial, before Martin, B., at the Guildhall Sittings after Michaelmas term last, the facts were as follows:— The defendant, a London merchant, had chartered a ship from the plaintiff, a ship-owner, to bring home a cargo from Bombay, at the rate of 3*l.* 5*s.* per ton. The terms of the charter-party were, that the vessel was to load from the factors of the freighter “a full and complete cargo of legal merchandise, with such quantity of goods applicable for broken stowage as the master may require, which full cargo the freighter binds himself to ship, not exceeding what she can reasonably stow and carry, over and above her tackle,” &c.

The charter-party was made by the defendant, not for the purpose of bringing home any cargo of his own, but on the speculation of making a profit by the charter, by reason of his obtaining an increased rate of freight. The ship was at Bombay, and the cargo was put on board by the agent of the defendant there, sufficient to fill all the carrying part of the vessel. The captain of the ship then proposed to fill the cabin and to bring a cargo to England in it. There was contradictory evidence between the captain and one of the defendant's agents, as to what took place on this subject, the captain stating that the agents agreed with him to pay freight after the rate of 7*l.* per ton for the goods, the agent asserting that this was not so, and that the rate of freight was to be arranged in England. The cabin was filled with goods, the property of the defendant's agents, which were consigned to him for sale as their factor. The goods could not have been brought home in the cargo part of the ship. The bill of lading was annexed to the bill of exchange drawn by the agents upon the defendant, which bill of exchange was sold to the East India Company, with the bill of lading annexed, as security for its due payment. The ship arrived in England and the goods were put in a warehouse under a stop for freight. After arrival the plaintiff demanded payment after the rate of 7*l.* per ton, which the defendant refused to pay, insisting that he was entitled to fill the cabin as well as any other part of the ship at the rate of 3*l.* 5*s.* The defendant had charged his agents in his account with freight after the rate of 7*l.* for the goods, and had allowed them commission for procuring the freight for him at the same rate. The bill of exchange pledged with the East India Company having been afterwards paid, the defendant subsequently to the commencement of the action, obtained possession of the bill of lading from the East India Company, and also a transfer of the goods to him at the dock warehouse. The money paid into court was intended to cover the amount of cabin freight at the rate of 3*l.* 5*s.* per ton.

For the defendant it was contended, that the agents had no authority to make a contract for the defendant to bring home their goods, the only authority which they possessed being a letter from the defendant, which, it was contended, was insufficient for this purpose. The learned judge was of this opinion, and he told the jury that if the agents at Bombay, although they had no authority from the

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defendant, nevertheless acting as if they had, put the goods into the cabin, and the defendant, on the arrival of the ship in England, took to these goods so brought home in the ship, and received the freight which he was entitled to, he was bound to pay the plaintiff the rate of freight current at that time from Bombay to England, and, therefore, that the plaintiff was not confined to the charter freight of 3*l*. 5*s*. per ton. It was also contended for the defendant that the action was brought too soon; that until the defendant got possession of the goods he was not liable, and that he did not obtain possession of them until he received them from the East India Company, which was after action brought. The learned judge overruled the objection, and directed the jury that the taking to the goods, which rendered the defendant liable to the freight, was the taking to the cabin cargo for the purpose of obtaining the freight, and was irrespective of the possession obtained after action brought. The jury found a verdict for the plaintiff.

Bramwell having obtained a rule *nisi* for misdirection,

Crowder and *Needham* showed cause. The judge rightly directed the jury. It is true the defendant was not the owner of the goods; but he dealt with them as his property, and accepted them as the consignee. This is a question of ratification and adoption. The defendant ratified the act of his agents at Bombay, for he paid them commission on freight at the rate of 7*l*., and he dealt with the goods as his own before the action was brought.

Bramwell and *Willes*, *contra*. The judge misdirected the jury. The defendant was not the owner of the goods, and they did not come into his possession until after the action was brought.

Cur. adv. vult.

The judgment of the court was now delivered by —

POLLOCK, C. B. After stating the facts as above set forth, the learned judge proceeded. We think that in this case the direction was perfectly right. The defendant was not entitled under the charter to fill up the cabin at all, but he insisted on taking and did take, the benefit of it, and actually got paid 7*l*. per ton in respect of the freight of goods carried home in it. It is true he insisted that he had a right to have the benefit of the cabin at 3*l*. 5*s*. per ton, but in that he was in the wrong. He had no such right. The plaintiff insisted that he was entitled to have freight 7*l*. per ton, which he alleged the authorized agents for the defendant at Bombay contracted to pay; but he also was in error in this, because we think the agents at Bombay were not authorized to make the contract, even if they did make it, as to which there was contradictory evidence. What is then the legal consequence? Why, that the defendant must pay, in respect of the benefit obtained by him, the fair value of

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such benefit, or in other words, the current rate of freight at the time of the lading on board at Bombay. It is what the jury have found him to be liable to under the direction of the judge. The second objection was, that the action was brought too soon. This arose upon a piece of evidence given by the plaintiff, as follows: The bill of lading, as has been observed, was pledged to the East India Company, and after the action was brought, the bill of exchange having been paid, the defendant obtained possession of the bill of lading to the East India Company, and the goods were transferred to him, namely, at the dock warehouse; and it was insisted that until he got possession of the goods he was not liable, and that at all events there was misdirection to the jury as to the point that the possession of the goods which the defendant then obtained was actual possession for the purposes of sale as factor for his Bombay agent, but the possession or taking to the goods which rendered him liable to the freight, was the taking to the goods as the cargo brought home for him in the cabin of the ship for the purpose of obtaining the freight; it was wholly irrespective of the actual possession obtained after the action brought. This was the taking to the goods relied upon by the learned judge, and we think the jury acted under no misapprehension on the subject, but understood perfectly the question presented to them. The rule, therefore, will be discharged.

Rule discharged.

HORTON v. THE WESTMINSTER IMPROVEMENT COMMISSIONERS.¹

June 12, 1852.

Judge's Order, Construction of — "Upon Payment of Costs," Meaning of — Contract — Condition.

On the 19th of March previously to the Surrey spring assizes, the defendants obtained a judge's order, in substance as follows: — That the plaintiff should show the defendants certain letters within ten days, and that the defendants should be at liberty to take copies; that if the plaintiff should not be able to produce the letters he should make an affidavit to that effect within ten days, and that in default thereof all further proceedings be stayed till payment: that the venue be changed to Middlesex, on payment of costs, become fruitless by such change of venue; and that the time for inspection under the order of the 13th of March be also enlarged for ten days. The venue not having been changed by the defendants, was afterwards changed by the plaintiff: —

Held, that the defendants were liable to pay the costs, which had become fruitless by the change of venue, the words "upon payment of costs" being, under the circumstances of the case, words of agreement and not words of condition.

THIS was a rule calling upon the defendants to show cause why they should not pay the plaintiff his costs under the following circumstances.

¹ 21 Law J. Rep. (N. S.) Exch. 325.

On the 19th of March, the defendants obtained the following judge's order :—

"Horton v. the Westminster Improvement Commissioners. Upon hearing counsel on both sides, and reading the affidavit of G. J. Mahew and the affidavit of W. Mackenzie, the affidavit of J. V. Jagger and the affidavit of S. L. Lucena, I do order that the plaintiff do, if in his power, produce and show to the defendants, their attorneys or agents, a letter written and sent by one James Bayley Farmer, to the plaintiff, on or about the 1st day of June, 1851, a letter written and sent by one A. G. Pooley to the plaintiff, on or about the 2d of June, 1851, within ten days ; and that the defendants be at liberty to take extracts or copies thereof on payment of such costs as the Master may think fit on taxation. That if the plaintiff shall not be able to produce the letters, he shall make and file an affidavit to that effect within three days, and that in default thereof all further proceedings be stayed until payment. That the venue be changed to Middlesex on payment of costs (to be taxed) become fruitless by such change of venue. That the plaintiff be at liberty to demur generally to any of the pleas pleaded, counsel's fees to be allowed in costs, and that the time for inspection under the order herein of the 13th of March, 1852, be also enlarged for ten days."

The defendants not having drawn up the order on the morning of the 19th, the plaintiff, between 4 and 5 o'clock of the afternoon of that day obtained a summons to compel the defendants to abide by the terms of the order. Between 5 and 6 o'clock on the afternoon of the same day, the defendants' attorney, drew up and served upon the plaintiff the order of the 19th of March, solely, as was stated in the defendants' affidavits, in consequence of the above-mentioned summons having been obtained by the plaintiff. In consequence of the order, the plaintiff had suspended his preparations for the trial of the cause at the Surrey assizes. The defendants took no steps towards changing the venue, but the venue was afterwards changed to Middlesex by the plaintiff.

Bramwell and *Honyman*, for the defendants, now showed cause. This order is conditional only. It contains no words of agreement. Its effect is merely this, that if the defendants do not pay the costs, they do not become entitled to change the venue. But if they do not change the venue, they are not bound to pay the costs. In this case the defendants did not change the venue. It was changed by the plaintiff. The plaintiff might have demanded the costs, and if the defendants had refused to pay them, he might have taken the cause down for trial in Surrey. The plaintiff's remedy was by trying the cause in Surrey if the defendants refused to pay the costs, or by asking the judge who made the order to make it on the terms that the costs should, at all events, be paid by the defendants. *Field v. Sawyer*, 5 Com. B. Rep. 844 ; s. c. 17 Law J. Rep. (N. s.) C. P. 211 ; *Pugh v. Kerr*, 5 Mee. & W. 164 ; s. c. 9 Law J. Rep. (N. s.) Exch. 255 ; *Price v. Philcox*, 7 Dowl. P. C. 559, and *Fricker v. Eastman*, 11 East, 319, are in point.

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Garth, in support of the rule, was stopped by the court.

PARKE, B. I think this rule must be absolute. The words "on payment of costs" may be either words of agreement or words importing a condition. In the case of *Pugh v. Kerr*, we considered them to be words of condition only. In the present case the time that has been suffered to elapse before the trial, and the rest of the order relating to the inspection of the letters, show that it was intended that the venue should be changed and the costs paid absolutely; consequently the words in the order, "on payment of costs," are words of agreement and not words of condition only.

POLLOCK, C. B., ALDERSON, B., and MARTIN, B., concurred.

Rule absolute.

HANKIN v. BENNETT.¹

June 26, 1852.

Bankrupt Act — 6 Geo. 4, c. 16, s. 56 — *Contingent Debt* — *Contingent Liability* — *Bankruptcy Certificate* — *Surety*.

The defendant executed a bond, whereby he became liable as a surety to pay to the plaintiff such costs as the plaintiff should in due course of law be liable to pay, in case a verdict should pass for certain defendants in an action of *scire facias*; wherein the now plaintiff sued as a nominal party. The action on the *scire facias* was tried, at the spring assizes in 1848, and a verdict was found for the then defendants; after which, in Easter term, a rule nisi for a new trial was obtained. In the November following, the defendant in the present action became a bankrupt. In Hilary term, 1849, the rule for a new trial was discharged. In May, the defendant obtained his certificate, and in August, the costs in the action on the *scire facias* were taxed, and final judgment signed against the now plaintiff:—

Held, that the plaintiff's claim was not barred by the defendant's certificate, the debt not being a contingent debt within the 6 Geo. 4, c. 16, s. 56, but only a contingent liability.

DEBT. The declaration stated that the defendant, by his bond, became bound to the plaintiff in 200*l.*, subject to a condition for making the same void, if one F. T. Gell and the defendant, or either of them, should pay to the plaintiff such costs as the plaintiff should, in due course of law, be liable to pay in case a verdict should pass for certain defendants in an action of *scire facias* then pending, which had been brought by one Ide Cozens, in the name of the now plaintiff, as plaintiff; that afterwards, at the Hertfordshire spring assizes in 1848, a verdict was found for the defendants in the said action; that in August, 1849, the costs of the said defendants were taxed at 54*2l.* 3*s.*,

¹ 21 Law J. Rep. (N. S.) Exch. 326.

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which sum the plaintiff then became liable to pay to the said defendants; that the now defendant and the said F. T. Gell had not paid to the plaintiff the said costs, whereby the bond became forfeited.

Third plea, that on the 29th of March, 1849, the defendant became bankrupt, and that the cause of action accrued before the bankruptcy.

At the trial, before Pollock, C. B., at the Middlesex sittings after Hilary term, 1850, the jury found a verdict for the plaintiff for 200*l.* subject to the following

CASE. In 1819, one T. Hankin entered up judgment against J. Smith and John Cozens, on a warrant of attorney given to secure payment of 3,000*l.* from Smith to T. Hankin. J. Cozens died in 1837, and T. Hankin died soon after, having made the plaintiff his executor. In February, 1846, one Ide Cozens, claiming to be assignee of the judgment debt under an assignment from John Hankin, sued out a *sci. fa.* against the heirs and devisees of Smith for enforcing the judgment. A judge, thereupon, made an order for Ide Cozens to give the now plaintiff security for such costs as the latter might have to pay in the event of the defendants in the *sci. fa.* succeeding in that action. In June, 1846, the defendant and one F. T. Gell became security for 200*l.*, and then executed the bond on which this action is brought. The condition of the bond sufficiently appears from the declaration. The action on the *scire facias* was tried, at the Hertfordshire spring assizes in 1848, when a verdict was found for the defendants. In Easter term, 1848, Ide Cozens obtained a rule *nisi* for a new trial, which rule was in Hilary term, 1840, heard and discharged.

In November, 1848, a fiat in bankruptcy issued against the now defendant, under which he was adjudged a bankrupt, and he obtained his certificate in May, 1849. The costs of the defendants in the *scire facias* were taxed at the sum of 542*l.* 2*s.* 8*d.*, in August, 1849, and judgment was then signed thereon against the now plaintiff. The question was, whether the plaintiff was entitled to retain the issue joined on the last plea.

Cleasby, for the plaintiff (June 9 and 10). The plaintiff is entitled to judgment, for this is not a contingent debt provable under the commission, within the 6 Geo. 4, c. 16, s. 56. *Biré v. Moreau*, 4 Bing. 57; s. c. 5 Law J. Rep. C. P. 61, applies. There the defendant obtained a verdict in July, and the plaintiff became a bankrupt in August, and judgment was obtained against him in Michaelmas term following, and a certificate under the commission was obtained for him in the same term. It was held, that the plaintiff was liable to an execution for the costs of the action, notwithstanding the 6 Geo. 4, c. 16, s. 56.

[PLATT, B. What affidavit of debt could the plaintiff have made?]

None. To make it the case of a debt provable under the commission, it must be provable at the time of the bankruptcy. *Ex parte Marshall*, 1 Mont. & Ayr. 118; s. c. 3 Law J. Rep. (N. S.) Bankr. 37,

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s in point. The contingency must be as to the debt being payable or not. *In re Willis*, 4 Exch. Rep. 530; s. c. 19 Law J. Rep. (N. S.) Exch. 30, shows that, under the Bankrupt Act, a claim on a guaranty or a sum certain when due is provable as a debt; and before it is due is provable as a debt due on a contingency. A liability to railway calls is not a debt due on a contingency, for the contingency is not capable of valuation, and it is uncertain in its nature. *The South Staffordshire Railway Company v. Burnside*, 5 Exch. Rep. 129; s. c. 2 Eng. Rep. 418. At the time of the bankruptcy in November, 1848, the rule for the new trial in the action of *scire facias* was pending. The costs were not taxed until August, 1849, and until that time it could not be ascertained whether the defendants in that action would have to pay or to receive costs. There was no contingent debt; there was nothing but a contingent liability.

C. E. Pollock, for the defendant. The plaintiff is barred by the defendant's certificate, for the debt was provable under the commission. The defendant became bound to pay such costs to the plaintiff as the plaintiff should become liable to pay "in due course of law." The verdict was obtained in Hilary vacation, 1848; the judgment, therefore, in due course of law, might have been obtained in Easter term following, which was prior to the bankruptcy.

[PLATT, B. You undertook to indemnify the plaintiff against the ultimate costs.

MARTIN, B. *Ide Cozens was dominus litis.*]

The plaintiff Hankin chose to put himself into the hands of Cozens, but the defendant is not to be bound by the acts of Cozens. It was the duty of the plaintiff to procure the costs to be taxed according to the principle laid down in *Candler v. Fuller*, Willes, 62. In *Hodgson v. Bell*, 7 Term Rep. 97, the surety did not become liable to pay the money in the first instance. That was merely a case of liability, and yet it was held that the surety might have proved his debt under the commission.

[MARTIN, B. That case was decided on the ground of a forfeiture of the bond having taken place. If, in the present case, the bond had become forfeited before the bankruptcy, you would be right.]

The bond has been forfeited in spirit.

[MARTIN, B. The plaintiff did not become liable until the costs were ascertained.]

He cited and mentioned *Brown v. Fleetwood*, 5 Mee. & W. 19; s. c. 8 Law J. Rep. (N. S.) Exch. 169; *Deacon's Bankruptcy Cases*, last edit. p. 264; *Bouteflour v. Coats*, Cowp. 25; *Dinsdale v. Eames*, 2 B. & B. 8, and *Ex parte Harrison*, 3 Mont. D. & D. 350.

Cleasby, in reply. The law as to this point is confined to contingent debts, and does not extend to contingent liabilities. To make it incumbent on the plaintiff to prove under the commission, something must exist that can properly be called a debt. There could not be any debt due before the bankruptcy, from the present defendant to the plaintiff, as there never was a debt due from the original plain-

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tiff to the original defendants before the bankruptcy. He cited and referred to *Taylor v. Young*, 3 B. & Ald. 521; *Hinton v. Acraman*, 2 Com. B. Rep. 367; s. c. 15 Law J. Rep. (N. S.) C. P. 52, and *Brough v. Adcock*, 7 Bing. 760; s. c. 9 Law J. Rep. C. P. 230.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

MARTIN, B. (After stating the facts, his lordship proceeded.) The question in this case was, whether the action on the bond, for the purpose of recovering these costs, was barred by the certificate? We are of opinion that it was not. The bond itself was not forfeited at the time when the fiat issued; if it had been, the question would have arisen whether the demand was provable under the authority of the case of *Hodgson v. Bell*; but it is quite clear that no action whatever could have been maintained on the bond, on the 14th of November, 1848, when the fiat issued; the defendant, therefore, could derive no advantage from the principle laid down in the above case. It was argued that the liability continued, as the condition of the bond was a debt payable on a contingency within the 6 Geo. 4, c. 16, s. 56, the Bankrupt Act, which was in force at the time when the fiat was issued against the defendant; and that it was provable under the fiat, and a demand, therefore, barred. We think, however, this liability was not a debt at all within the meaning of the section. It was a contract to indemnify a nominal plaintiff, whose name was used by a third person, against such costs as the plaintiff would become liable to pay if the defendants obtained judgment in their favor. It seems to us impossible to consider that this is a debt. It is a contingent liability, but not a contingent debt. The case of *Biré v. Moreau* decided that the costs themselves would not be a contingent debt; *à fortiori*, we think the contract to indemnify against them could not be one. *Ex parte Tindal*, 8 Bing. 402; s. c. 1 Law J. Rep. (N. S.) Chanc. 193. The nature of debts payable on a contingency, provable under a fiat, was fully considered by Lord Chancellor Brougham, assisted by the late Lord Chief Justice Tindal and Justice Littledale; and there is nothing there to be found to support the view that such a liability as the present is provable under the 56th section of the late act. In the case of *Morrison v. Glover*, 4 Exch. 430; s. c. 19 Law J. Rep. (N. S.) Exch. 20, decided in 1849, the court carefully avoided giving any opinion as to the right to prove on a bond of indemnity, when the damage was not ascertained at the time of the claim to prove. That was a case arising on a guaranty to pay a certain sum yearly, — a very different contract from the present. It is proper to be observed, under the Bankrupt Consolidation Act, 12 & 13 Vict. c. 106, s. 177, that the section in the former statute as to debts payable on a contingency is reenacted; and by

¹ POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

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ie 178th section there is an extension of the right to claim and prove
r a liability to pay money on a contingency. The judgment will be
or the plaintiff.

Judgment for the plaintiff.

ATKINSON and another v. STEPHENS.¹

April 17, 1852.

Pleading — Demurrer — Plea to Damages — Declaration — Sale of Goods at an Intermediate Port to defray the Repairs of the Ship — Liability of Shipowner where the Vessel does not arrive at her Port of Destination.

A declaration in *assumpsit* stated that the defendant was the owner of a certain ship at a certain port beyond the seas, and bound from thence to London; that the plaintiffs caused certain goods to be shipped on board the said ship at the said port, to be carried thence to London, and then delivered to the plaintiffs for certain freight; that the ship set sail and proceeded on her voyage; that having been injured by tempestuous weather, the master was obliged to put into the port of Monte Video, in order to have her repaired; that to pay for these repairs, it became necessary for the master to raise money, and without his so doing the vessel would have been unable to leave the port; and that the master, not being able to obtain the money otherwise, took the goods of the plaintiffs and sold them for a certain sum, with which he paid the expenses of the repairs; that the defendant promised to pay the plaintiffs the value for which the goods would have been sold had they been delivered by the defendant to the plaintiffs in London.

Plea, so far as the declaration claims or seeks to recover damages beyond the value of the ship and freight thereafter mentioned, in respect of the breaches of promise complained of, that the plaintiffs ought not to maintain their action to recover damages to a greater amount than aforesaid, because, after the goods were shipped, and before any part had been conveyed to London, and whilst they were in the custody and under the control of the master, the master wrongfully and without any authority from the defendant, and without his knowledge, privity, or consent, sold the goods, and the defendant thereby was unable to deliver them to the plaintiffs. That the defendant, at the said time when, &c., was the owner of a British ship duly registered; that the goods were shipped by being received into the custody of the master; and that the defendant never personally accepted or received, nor did he interfere with them or the shipping or the sale, except as such owner of the vessel; that the shipping and sale took place after the 1st of September, 1813, and that the sale was done without the fault or privity of the defendant; and further, that the value of the ship, together with the value of the freight due or to grow due during the voyage, did not exceed a certain sum therein named: —

Held, on special demurrer, first, that the plea was bad, as it was pleaded merely to the damages.

Secondly, that when goods forming part of the freight of a ship have been sold at an intermediate port to defray expenses necessarily incurred in repairing the vessel, the merchant is not entitled to claim from the shipowner the price which they might have realized at the port of delivery unless the ship arrives; and that as the declaration did not contain any averment of the arrival of the ship at her port of destination, it was bad.

Semble, that the plea did not bring the case within the 53 Geo. 3, c. 159.

ASSUMPSIT. The second count of the declaration stated that the defendant was the owner of a certain ship, then being at Buenos Ayres, and bound from thence to London; and thereupon the plain-

tiffs, at the special instance and request of the defendant, caused to be shipped on board of the ship at Buenos Ayres divers goods and merchandises of the plaintiffs of great value, to be carried in the ship from Buenos Ayres to London; and there to be delivered to the plaintiffs, for certain freight, to be paid by the plaintiffs to the defendant, according to certain bills of lading; that the ship set sail on her voyage from Buenos Ayres to London with the goods and merchandises of the plaintiffs, and certain other cargo on board thereof, and afterwards and while on her voyage she was, by the violence of the winds and waves, and by means of tempestuous weather, greatly damaged, and in consequence thereof, the master was forced to and did necessarily cause the ship to put into Monte Video, to have the damage repaired. And the damage was then and there repaired. That the costs and expenses thereby incurred by the defendant in the repairing the damage, and in the providing the necessary stores, amounted to 5,000*l*. And for the purpose of repairing the ship, and of paying for repairing, and of enabling the ship to leave the port and proceed to sea, it became necessary for the master to raise large sums of money, and without his so doing the ship would have been unable to leave the port or proceed to sea. And the said ship, together with the freight to be earned, would have been wholly lost to the defendant; and because the master had not then, and could not otherwise, obtain the money so necessary as aforesaid, the master did, for the purpose of raising the money, take the goods of the plaintiffs and sell the same for 1,200*l*., with which money, together with the sum of 3,800*l*., realized by the sale of other goods of the cargo, by the master in like manner sold, the costs and expenses so incurred were paid. And the defendant did then, in consideration of the premises, promise the plaintiffs that he would, on the request of the plaintiffs, pay them the value of the goods and merchandises so sold and contracted to be carried, conveyed and delivered, for which the same might have been sold, had the same been delivered by the defendant to the plaintiffs at the port of London; that the value of the goods and merchandise so sold, for which the same might have been sold at London, had the same been delivered there to the plaintiffs, amounted to the sum of 2,500*l*., of all which the defendant had notice, and was afterwards requested by the plaintiffs to pay to them the said last-mentioned moneys. Breach, non-payment. The third and fourth counts were similar.

Plea to the second, third, and fourth counts, so far as the same claim or seek to recover damages beyond the value of the ship and freight hereinafter mentioned, in respect of the breaches of promise, the defendant says that the plaintiffs ought not to maintain their action against him to recover any damages beyond, or to a greater amount than aforesaid in respect of the said breaches of promise in the second, third, and fourth counts, because the said several goods and merchandises were so caused to be shipped and loaded on board the ship at the same time, and to be carried on the same voyage as part of the same cargo; and that afterwards, the ship sailed on her voyage from Buenos Ayres to London, with the goods and merchan-

dises on board; and that after the ship had so sailed, and before she had completed her voyage, and before any part of her goods and merchandises had been carried to the port of London, and whilst they were in the custody and under the control of the master of the ship, the master of the ship, on the occasion of the said sales, wrongfully, and without any authority from the defendant, and without his knowledge, privity, or consent, sold and disposed of, as part of the same transaction, the said goods and merchandises, and then caused and permitted the same to be sold to, and carried away by divers persons, at Monte Video, which is the sale in the several counts mentioned; and the defendant then, thereby became, and was unable to deliver the same to the plaintiffs, and did not deliver the same to the plaintiffs; that before and at the time when the said goods and merchandises were so shipped, delivered, accepted, and received on board of the ship as aforesaid, the defendant was, and has been, and at the time of the sale and disposal and carrying away of the said goods and merchandises, was the owner of the ship or vessel, the same being a British ship, duly registered; and that the said goods and merchandises were so caused to be shipped and loaded on board the ship, by the same being laden and put on board the said ship or vessel, and received into the custody of the master of the ship, whilst the defendant was such owner, and the defendant never personally accepted or received the said goods and merchandises, nor did he in any way interfere with them or the shipping or loading thereof, or the sale or disposal, or carrying away thereof, nor was he in any way, save by his being such owner, concerned therein, and the goods and merchandises were so laden and put on board the ship or vessel, as aforesaid, and were so sold, disposed of, and carried away, and lost to the plaintiffs, after the first day of September, in the year of our Lord one thousand eight hundred and thirteen, and the said sale, disposal, and carrying away thereof, was an act, matter, and thing done and occasioned without the fault or privity of the defendant; and that the value of the said ship or vessel, at the time of the said goods and merchandises being so sold, disposed of, carried away, or at any time from the time when the said goods and merchandises were laden and put on board the said ship or vessel, did not, together with the value of the freight due, or to grow due, for or during the said voyage, exceed the sum of 1,100*l.*; but the value of the said vessel and freight due, and to grow due, for, and during the said voyage, and at the time of the said loss, amounted to a certain sum, not exceeding the said sum of 1,100*l.*, to wit, the sum of 1,100*l.*, and no more; and no other freight or voyage was contracted for in respect of the said ship or vessel, at the time of the happening of the said loss or damage. Verification. Prayer of judgment, if the plaintiffs ought to maintain their action as to the second, third, and fourth counts, to recover any damage beyond, or to a greater amount than the said value of the said ship or freight.

Special demurrer, assigning for cause, *inter alia*, that the plea was not pleaded to the causes of action in the counts mentioned, but to the amount of damages, and that the fact of the sale as alleged being

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wrongful, and done without the privity of the defendant, was no defence; that the plea amounted to the general issue, and that the statutes on which the plea professed to be founded, ought to have been specially pleaded.

The case was partly argued in Trinity term, 1851 (June 11), and stood over to last Hilary term (Jan. 19).

J. Wilde, in support of the demurrer, was stopped by the court, who called upon

Willes, to support the plea. The plea is good.

[*MARTIN, B.* I doubt whether the plea is good in substance, as it appears to me to show a lawful mode of borrowing money, and, therefore, it does not fall within the 53 Geo. 3, c. 159.]

The validity of the loan would depend on whether the transaction was legal.

[*PARKE, B.* The plea is bad, as it is merely pleaded to the damage, and as it does not deny the allegation that the goods were necessarily sold by the master for the purpose of enabling the vessel to continue the voyage. I do not think that it brings the case within the 53 Geo. 3, c. 159, the 7 Geo. 2, c. 15, and the 26 Geo. 3, c. 86.]

At all events the declaration is bad. The facts stated, show an executed consideration, and afford no foundation for the promise alleged. There is a statement that the vessel was compelled to put into port to get repaired, and that the goods of the plaintiffs were sold to meet the expenses of the repairs; but there is no averment that the ship subsequently arrived at her place of destination. There was no duty, therefore, imposed on the owner of the ship to pay to the merchant the price which the goods would have realized had they been disposed of at the place of discharge. According to the views stated in *Duncan v. Benson*, 1 Exch. Rep. 537; s. c. 17 Law J. Rep. (N. S.) Exch. 238; in error, 3 Exch. Rep. 644; s. c. 18 Law J. Rep. (N. S.) Exch. 169, a contract to indemnify the owner of the goods for the loss he had sustained is created by the sale; but the amount of indemnity to which he is entitled, is the sum which they actually produce at the intermediate port. *Richardson v. Nourse*, 3 B. & Ald. 237. The case resembles one of general average, and must be governed by the same rules. In *Abbott on Shipping*, 5th edit, p. 371, the law on the subject is stated to be as follows:—"If the master, being compelled to take refuge in a foreign port during the course of his voyage, has occasion for money for the repairs of the ship, or other expenses necessary to enable him to prosecute and complete the voyage, and cannot otherwise obtain it, he may, as hath been before observed, either hypothecate the whole cargo, or sell a part of it for that purpose. In the latter case, if the ship reach the place of destination, the merchant will be entitled to the clear value for which the goods might have been sold at that place, or he may take the sum for which the goods actually sold; and if he is content to do so, he may deduct that sum from the money payable for the freight of the other goods; and this, although the owner may have assigned the freight to a third person,

and the goods were sold without an urgent necessity. If the ship afterwards perish, and reach not the destined port, the ordinance of Wisbuy expressly declares that the money raised by the sale shall be paid to the merchant by the master; and Cleirac, Kuricke, Valin, and Pothier agree in opinion that the money is in such case due, not only from the master, but also from the owners, because it was expended for a purpose of which they were at all events liable to sustain the charge. But none of the other ordinances contain such a provision; and Emerigon contends, on the authority of the Consolato del Mare, and of the ordinances of Oleron and Antwerp, that the money is only payable in case of the safe arrival of the ship, which was the opinion also of several whom Pothier consulted. And this doctrine seems the more reasonable, as the merchant is not thereby placed in a worse situation than if his goods had not been sold, but had remained on board the ship. I cannot find that the question ever arose in this country. By the Code de Commerce, the master is to account for the price received, deducting the freight," article 298. In *Hallett v. Wigram*, 19 Law J. Rep. (N. S.) C. P. 281, the Court of Common Pleas held that the plaintiffs were entitled to recover the amount which the goods would have realized at the place of discharge; but the declaration there contained an averment that the ship had actually arrived.

Wilde, in reply. The declaration is good. The argument, that the arrival of the ship at the port of discharge was indispensable to the recovery, by the owner of the goods, of the price which they would have produced at that port, is fallacious and not supported by the authorities. *Richardson v. Nourse*, was a motion to set aside an award; and all that the court decided was, that they would not disturb the finding of the arbitrator, unless it could be shown that he had clearly decided contrary to law. In *Hallett v. Wigram*, there was indeed an allegation that the vessel had arrived; but that fact was not dwelt on in the argument, or made the subject of the decision. The case has been assimilated to one of general average, but incorrectly. The sale of the goods was effected, not for the general advantage, but to liquidate expenses for which the shipowner was bound to provide. It was, therefore, for his benefit alone; and the question is one simply between him and the proprietor of the goods. *Powell v. Gudgeon*, 5 M. & S. 431. It was a species of loan rendered compulsory on the plaintiffs, and the defendant having thus cut short this adventure by the sale of the goods, cannot take advantage of the non-arrival of the vessel to deprive the plaintiffs of the profits which they might, by the receipt of their goods, have realized. The foreign authorities are not agreed on this point; but the majority support the position contended for by the plaintiffs. By the 23d article of the judgment of Oleron, Pardessus, vol. 1. 339, it is provided that the master is to be authorized to sell the goods to defray the expenses of the vessel; and that, on her arrival, the value of the goods at the port of destination, after deducting the freight, is to be paid to the owner. In his Treatise on Insurance, vol. 2, p. 474, s. 9, Emerigon says that

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the ordinance of Wisbuy, article 68, contains a singular provision, to the effect that the owner shall repay to the merchant the value of the goods sold, although the ship subsequently perish, and that Valin and Pothier adopt this view. In Arnould on Insurance, vol. 2, p. 893, the law of England on the subject is stated to be—"That where goods are sold by the captain in order to raise funds for repairing particular average losses, or for defraying the ordinary expenses of the navigation, the loss arising from their sale must be made good by the ship-owner alone; who must, in such case pay the merchant the price which the goods would have fetched at their place of destination, deducting therefrom the freight which would have been due for their conveyance."

Cur. adv. vult.

The judgment of the court¹ was now delivered by—

POLLOCK, C. B. (after stating the pleadings, his lordship proceeded). The first question that was raised on the argument was, as to the sufficiency of the plea, which was founded on the statute 53 Geo. 3, c. 159; the court intimated its opinion that the plea could not be supported in point of law. If this be a loss or damage within the statute (which is, to say the least, very doubtful, and, indeed, we think it is not, because it is only a lawful mode of borrowing money for the necessary purposes of the ship), the plea is bad in form, being a plea to the damages, not to the cause of action. Mr. Willes, indeed, found himself obliged to give up the plea, and addressed himself to the declaration; and the only question now is, whether the second count of the declaration is good. The third and fourth stand on precisely the same footing as the second. The objection to the second count is, that the past consideration alleged does not support the precise promise stated, no such promise following as a consequence of law from the facts previously stated, for it is argued that, though the defendant may be bound to pay the price of the goods at the place of sale, or at the port of delivery, at the option of the plaintiffs, yet he is only so bound if the ship arrive at the port of destination; and there is no qualification of that sort alleged in the promise, nor any averment that the vessel did arrive at her destined port of delivery. We think that this objection ought to prevail.

The authorities in the English law on the subject are few, and consist of the cases of *Richardson v. Nourse*, *Aloys v. Tobin*, before Lord Ellenborough, cited in Abbott on Shipping 372; *Campbell v. Thompson*, 1 Stark. 490; *Duncan v. Benson*, also in the case of *Hallett v. Wigram*, which is a decision in the Common Pleas. None of these authorities give any countenance to the doctrine, that if a master sell the goods of a shipper at an intermediate port for necessary repairs, the shipper can claim the price of similar goods at the port of delivery unless the vessel arrived; and, therefore, the promise in this case,

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

Ward v. Ward.

which is to pay the value without any such condition, as if the goods had arrived at the port of delivery, does not follow as an inference of law from the premises. In the case of *Hallett v. Wigram* the vessel had arrived at the port of delivery; it was so averred in the declaration, and a promise to pay the value at that port on request was a correct statement of the promise which the law would infer. Whether the plaintiff be entitled to recover the price for which the goods actually sold, (which Lord Tenterden thinks he cannot unless the vessel arrives, because the merchant ought not to be in a better situation than he would be if the goods had not been sold,) is a question that does not arise on the record as it is now framed. Our judgment must, therefore, be for the defendant, for the insufficiency of the declaration; but Mr. Wilde, for the plaintiffs, having requested leave to amend if our opinion should be against him, he is at liberty to do so on payment of costs, otherwise there will be

Judgment for the defendant.

WARD v. WARD.¹

June 1, 1852.

Prescription — Non-User — Intention.

Whether mere non-user of a right amounts to an abandonment of the right, will depend upon the circumstances which caused the non-user.

Therefore, where the use of an immemorial right of way to a close, was discontinued because the occupiers had a more convenient access to it over another close in their occupation: —

Held, that the non-user afforded no evidence of an intention to abandon the right.

TRESPASS for breaking and entering two closes belonging to the plaintiff, with horses, carts, &c.

The defendant pleaded, first, not guilty; secondly, that he was seised of a close called the Stubbing Pits, and he then prescribed for an immemorial right of way over the closes in question to and from the Stubbing Pits, and for the occasions thereof; thirdly and fourthly, forty and twenty years' user respectively of such right of way under the Prescription Act, 2 & 3 Will. 4, c. 71. The replication traversed the rights set up in the several pleas, and the plaintiff also new assigned in respect of trespasses *extra viam*, to which new assignment the defendant pleaded not guilty.

Upon the trial, before Jervis, C. J., at the Derbyshire spring assizes, it appeared that originally the owners of the Stubbing Pits were entitled to and used the way in dispute, but that the use of

¹ 21 Law J. Rep. (N. S.) Exch. 334.

such way had been substantially discontinued from 1814, until about the time of the alleged trespass. During this interval the plaintiff himself held the Stubbing Pits with his other land for a short time; then a tenant named Bishop held it, and paid an acknowledgment to the plaintiff for using a different means of access, and then another tenant held it for twenty-six years, during all which time he discontinued the way in question, because he had other lands of his own adjoining the Stubbing Pits, which furnished him with a shorter and more convenient way to and from the Stubbing Pits, but in order to prevent any question arising as to a right being acquired on his own land, he regularly obtained an allowance of 1s. out of his rent as an acknowledgement for the use of the way over his own land. Upon these facts, a verdict was taken for the plaintiff upon all the pleas, with 40s. damages; leave being given to the defendant to move to enter a verdict in his favor on the second plea, and in last Easter term a rule *nisi* was accordingly obtained, against which, in Trinity term,

Hayes and Deighton showed cause.¹ There has been an actual disuse of the alleged way for more than thirty-four years. If a grant be presumed from twenty years use of the way, a surrender will in like manner be presumed from a disuse for the like period. *Moore v. Rawson*, 3 B. & C. 332; s. c. 3 Law J. Rep. K. B. 32. The allowance made to the last tenant of the Stubbing Pits for twenty-six years, shows that the landlord was well aware of the non-user, and after this lapse of time he cannot be permitted to fall back on his original right.

Macauley was not called upon to support the rule.

Per Curiam —

The original right is not affected by the non-user in the present case. Non-user may often be good evidence of an abandonment of the right, but this will depend upon the circumstances, and it must always be a question of intention. The non-user in the present case arose from the circumstance that it was more convenient for the tenant of the Stubbing Pits to go over his own land instead of the plaintiff's, and he did so. The landlord could not prevent this, and it is clear that no new right was acquired thereby. If, therefore, the owner of the Stubbing Pits could not recur to the original way, he would be without any means of access to the close. It would be absurd to presume any intention to abandon the way under these circumstances. It is a question of fact upon which there could only be one finding. The verdict, therefore, ought to be entered for the defendant on the second plea.

*Rule absolute.*²

¹ Before POLLOCK, C. B., ALDERSON, B., and MARTIN, B.

² In America, also, it has been often jury, whether mere non-user of a right declared to be a question solely for the amounts to an abandonment. *Parkins v.*

PINHORN v. SONSTER.¹

November 15, 1852.

Common Law Procedure Act, 15 & 16 Vict. c. 76, ss. 49, 57 — Special Demurrers.

Special demurrers pending at the time when the Common Law Procedure Act came into operation are not affected by its provisions, but must be decided according to the previous law.

TRESPASS quare clausum fregit. The defendant had pleaded a justification, to which the plaintiff demurred specially on the 15th of May, 1852, and the defendant joined in demurrer on the 21st of May.

T. Jones appeared in support of the demurrer; but

Macnamara, in support of the plea, objected that special demurrers were abolished by the Common Law Procedure Act, 15 & 16 Vict. c. 76. The 51st section enacts "that no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer." This section applies to pending demurrers. It is not prospective merely, for it does not enact that no pleading shall be specially demurred to, but that no pleading shall be "deemed," that is, adjudged, insufficient; and the word "heretofore" points to the nature of the defect which might formerly have been objected to. The question has been raised in the Court of Common Pleas, but it was then unnecessary to decide it.

Dunkham, 3 Strobbart, 224, (1848.) An entire and continual disuse for twenty consecutive years, would be strong evidence of an intention to abandon the right altogether. *French v. Braintree Manufacturing Company*, 23 Pickering, 216, (1839.) *Corning v. Gould*, 16 Wendell, 531, (1837.) *Wright v. Freeman*, 5 Harris & Johnson, 468, (1823.)

Non-user alone, for nine years, it seems, would not be sufficient to warrant a jury in inferring an abandonment. *Williams v. Nelson*, 23 Pickering, 141, (1839.) Or any period less than twenty years. *Emerson v. Wiley*, 10 Pickering, 310, (1830.) *Hurd v. Curtis*, 7 Metcalf, 94, (1843.) *McBee v. Loftis*, 3 Strobbart, Eq. 90, (1845.) Although non-user coupled with other facts, indicating such intention, might of course be sufficient. *Regina v.*

Chorley, 12 Jurist, 822, (1848.) *Manning v. Smith*, 6 Connecticut, 289, (1826.)

In Pennsylvania, it has been said that non-user for twenty-one years creates a presumption of abandonment, in analogy to their Statute of Limitations; but non-user for only twenty years does not. *Dyer v. Depui*, 5 Wharton, 584, (1840.) And where the right was originally created by deed, as a right to dig ore on the land of another, it has been held not lost by a non-user for forty years, there being in the mean time no adverse possession or enjoyment. *Arnold v. Stevens*, 24 Pickering, 106, (1839,) and see *White v. Crawford*, 10 Massachusetts, 183, (1813.) It would, of course be extinguished, like other rights by adverse occupation, the statutory time. *Yeakle v. Nace*, 2 Wharton, 123, (1837.)

¹ 21 Law J. Rep. (N. S.) Exch. 336; 16 Jur. 1001; 8 Exchequer Rep. 138.

[PLATT, B. The 51st section applies to the demurrers mentioned in the 50th section.¹]

If the 50th section applies only to future pleadings, the 51st section must apply to special demurrers then pending; for after the 24th of October, when the act came into operation, there can be no special demurrers. This is a remedial act, and, as is expressed in the recital, passed to render the process, practice and mode of pleading more simple and speedy, and should be construed liberally.

[ALDERSON, B. The 52d section² clearly refers only to future pleadings, and why should we try and spell out an injustice?]

There is no injustice, as the statute substantially declares that objections in the nature of special demurrers are frivolous; the court is, therefore, only asked to carry out the spirit of the statute. In some instances express exception is made as to pending proceedings, *e. g.* the 10th section, which relates to *alias* and *pluries* writs, the 12th, as to writs of summons, the 24th, as to writs of *distringas*, the 26th as to appearance *sec. stat.*, the 92d, as to rules to compute, the 100th, as to judgment as in case of nonsuit. By the 146th section, writs of error must be brought within six years of the judgment, which will materially affect the rights of parties, as formerly the time for bringing error was twenty years.

[ALDERSON, B. There would be six years from the act coming into operation, as it would not apply to past judgments.

POLLOCK, C. B. The act is no doubt a remedial one; but it is to be looked on as a whole. The sections are grouped under certain general headings, and the 51st section now relied on, is part of a series from the 49th to the 57th, which is headed "with respect to the language and form of pleadings in general." The 49th section abolishes all fictitious and needless averments, and the 50th, 51st, and 52d relate to demurrers, and the remedy for pleadings calculated to embarrass. How can they apply to a joinder of issue on matter of law which is ripe for the decision of the court?

PARKE, B. The rule for the construction of acts of parliament is laid down by Lord Coke, 2 Inst. 292, "*Mova constitutio, futuris formam imponere debet, non præteritis.*" This was recognized in this court, in *Moon v. Durden*, 2 Exch. Rep. 22, with this qualification, that the context may show that the legislature intended the statute to have a retrospective operation.]

¹ Section 50, enacts that "Either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed, for any such imperfection, omission, defect in or lack of form."

² Section 52, enacts "If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit."

This is a mere formal defect; and if an amendment were made there could not be another special demurrer.

[PARKE, B. That is a moot point which need not now be decided.]

The maxim referred to is founded on the principle that it cannot be supposed that the legislature meant to do injustice; but there is a distinction between a vested right and mere matters of form. This is well explained in an American case, *The People v. Tibbets*, 4 Cowen, 384. In that case, pending an information in the nature of a *quo warranto*, an act passed for facilitating the proceedings in such informations, and it was contended that it had no application to a pending information. The court admitted the general principles prohibiting any interference with vested rights, which had been elaborately discussed not long before by Chancellor Kent, in *Dash v. Van Kleeck*, 7 Johns. Rep. 503, but thus drew the distinction between an alteration of rights and an alteration of remedies or mere procedure. "What right is taken away? Are the defendants divested of their defence upon the merits? Their saying that the proceeding is hastened in point of form, makes nothing for them. They have no right to complain of this. It is complaining that he is put upon his defence to-day, whereas he had a right to delay it till the morrow; a singular head of vested rights; a right to delay justice. . . . The pretence of the defendant does not merit the name of right. It relates to the remedy. The act merely says, that under its regulations the questions between the parties may peradventure be brought to trial six months earlier than they would otherwise have been. This is a very usual subject of legislative interference. Indeed the court might do the same thing, independent of the legislature. Suppose they were to make an order that all rules to plead should be ten days instead of twenty, would it lie with the parties interested to gainsay this? At this rate every statute by which the collection of debts or the trial of rights is rendered more speedy or effectual, would be inapplicable and void in reference to subsisting rights." This case, with many others on the subject, are given in Wise's Common Law Procedure Act, pp. 2, 4, and the editor there says:—"That, in the majority of instances, the present act will be found to apply to pending proceedings." Various instances are there given of acts of parliament having a retrospective effect. *Brooks v. Bockett*, 9 Q. B. Rep. 847; s. c. 16 Law J. Rep. (N. S.) Q. B. 178; *Hodgkinson v. Wyatt*, 4 Q. B. Rep. 749; s. c. 13 Law J. Rep. (N. S.) Q. B. 73; *Doe d. Johnson v. Liversedge*, 11 Mee. & W. 517; s. c. 13 Law J. Rep. (N. S.) Exch. 61; *Bell v. Smith*, 5 Car. & P. 10. In *Freeman v. Moyes*, 1 Ad. & E. 338, the 3 & 4 Will. 4, c. 42, s. 31, which rendered executors and administrators liable for the costs of actions brought by them in their representative capacity, was held to extend to actions commenced before the statute came into operation but tried afterwards.

[PARKE, B. Littledale, J., dissented from that judgment; and looking at the words of the statute, I think with very good reason.]

The court might now grant leave to withdraw the demurrer, without costs. In a note to this section, in the edition of the statute already cited, p. 86, it is said:—"It is to be observed that the clause

Pinhorn v. Sonster.

as to giving judgment according to the very right of the cause, is confined to issues on such demurrers, that is, those described in the early part of the section; and would, therefore, not apply to where a special demurrer has been delivered, and there has been a joinder in demurrer prior to the 24th of October. Whether section 51 would apply to such case, must be determined at an early period by the courts; but it would seem to follow from the language of the 222d section that, at any rate, an amendment might be allowed without costs; and if the special demurrer, as is generally the case on the eve of the long vacation, was delivered merely for delay, it would be a very proper exercise of those powers under that section to dispense with the costs."

[POLLOCK, C. B. Suppose judgment had been given last term on this demurrer, and error had been brought; would our judgment have been reversed by reason of the 51st section?]

The court of error would give the judgment the court below ought to have given.

POLLOCK, C. B. We have no doubt on the point. The right to have judgment on this special demurrer is not taken away.

PARKE, B. It is very plain to my mind that these clauses refer to future pleadings, not to past. To apply them to the latter would be unjust; for the parties have demurred, on the faith that they were entitled to do so. Taking all these clauses together, it is clear that they contemplate future proceedings, and future proceedings only. The 50th section provides that, for the future, judgment on demurrer shall be given according to the very right of the cause; the 51st section, that, for the future, no special demurrers shall be allowed; and section 52, that for the future, when pleadings are drawn in a way calculated to prejudice, embarrass, or delay the fair trial of the action, objection may be taken to them in the manner there pointed out, namely, by application to the court or a judge to amend or strike them out; and reading these clauses thus, they all become consistent and form one uniform system.

ALDERSON, B. It is clear that the 52d section applies only to future demurrers, and it would be strange to apply the 51st section to a case in which the remedy is not given.

PLATT, B. The section only prevents future special demurrers.

[The court then gave time to *Macnamara* to elect whether he would amend or argue the demurrers.]

GOODLIFFE v. NEAVES.¹

November 19, 1852.

*Common Law Procedure Act, 15 & 16 Vict., c. 76, ss. 27, 28—
Appearance sec. stat.*

Where an appearance *sec. stat.* has been entered before the 24th of October, when the 15 & 16 Vict. c. 76, came into operation, the 27th and 28th sections of that act do not apply.

Therefore, where a writ was issued on the 29th of September, upon which an appearance *sec. stat.* was entered on the 8th of October, and on the 27th of October, a declaration filed, with a notice to plead indorsed thereon, and no plea pleaded:—

Held, that judgment signed, without any notice of filing the declaration having been given to the defendant, was irregular, and the judgment and execution thereon was set aside.

THIS was an action of debt. The writ was issued on the 29th of September, and duly served, but no appearance being entered by the defendant, the plaintiff, on the 8th of October, entered an appearance *sec. stat.*, and on the 27th of October filed a declaration, indorsed with a notice to plead in eight days, but gave no notice to the defendant of the declaration being filed. No plea being pleaded, judgment was signed on the 5th November, and execution issued thereon, to set aside which a rule *nisi* had been obtained by J. Brown, on a previous day; against which —

T. Jones now showed cause. The 62d section enacts, “that no rule to plead or demand of plea shall be necessary, and the notice to plead indorsed on the declaration, or delivered separately, shall be sufficient.” And by the 28th section, where the writ is not indorsed in the special form, which is the case here, judgment may be signed upon default of appearance, without any notice of filing the declaration being given. No copy of the writ of summons has been filed, but that is not requisite where the writ is served;² it is only requisite where a judge’s order is obtained for leave to proceed.

[*PARKE, B.* You should surely proceed either under the old law or under the new. The appearance was entered according to the old law, and that is equivalent to an appearance by the defendant. The 28th section only refers to prospective non-appearance. The defendant was, therefore, not called on to plead without notice of declaration being filed. It would be productive of the greatest inconvenience

¹ 21 Law J. Rep. (N. S.) Exch. 338; 17 Jur. 1025.

² Section 28, enacts, “That in case of such non-appearance, where the writ of summons is not indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge’s order for leave to proceed under the provisions of this act, and a copy of the writ of summons, to file a declaration indorsed with a notice to plead in eight days, and to sign judgment by default at the expiration of the time to plead, so indorsed as aforesaid; and in the event of no plea being delivered,” &c.

if judgment were to be allowed to be obtained without any notice being given to the defendant.]

That will be so in future, and the legislature has intentionally abolished the needless forms of rules to plead and demand of plea by the 62d section, and no exception is made as to pending actions. The supposed injustice of judgment without appearance is only the adoption of the well-known principle in the French law of *élection du domicile*; and the defendant, by neglecting to appear, makes the office of the court the place where all pleadings or notices may be served upon him.

[PARKE, B. This is not a question of non-appearance, but of appearance.]

It is substantially the same as non-appearance, for the form is, that the plaintiff appears for the defendant according to the statute.

[PARKE, B. The statute has not provided for the case of an appearance previously entered. Sections 27 and 28, apply to cases of future non-appearances, and section 30 to future appearances. You must, therefore, go on either under the old or under the new act. It cannot be tolerated that judgment is to be obtained without any notice whatever.

ALDERSON, B. The form of the writ given by the 2 Will. 4, c. 39, states that in default of appearance the plaintiff "may cause an appearance to be entered for you and proceed thereon to judgment and execution." Therefore the defendant has appeared; and if he had appeared under the new act, you must have gone on in a given way, — and why should not that way be adopted in this case?

PLATT, B. If you seek the benefit of the new statute, you should bear the correlative burthen.]

The act gives a more speedy procedure, which must, in general, be applied to the proceedings, although the action was commenced before it came into operation; and why should a distinction be preserved contrary to the general policy of the act.

J. Brown was not called on to support the rule.

POLLOCK, C. B. I am clearly of opinion that the new act does not apply to the present state of things. I purposely avoided saying more than that the act does not apply to this case, which is the only point now before us.

PARKE, B. I am of the same opinion. These sections of the statute do not apply where an appearance has been entered, but to future non-appearances after service of the writ. By the 26th section the statute relating to appearance for a defendant is repealed, "except so far as may be necessary to support proceedings heretofore taken." This entry of appearance is, therefore, preserved, and the defendant has appeared, and the sections which have been referred to only refer to non-appearances. The judgment, therefore, which has been signed without notice, is bad, as notice of the declaration being filed ought to have been given. As to the 62d section, it may be that after the

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declaration has been filed, no demand of plea may be necessary, but I give no judgment on that point.

ALDERSON, B. I am of the same opinion. What the plaintiff has done is, in fact, an appearance by the defendant, and he must either proceed wholly according to the old practice, or according to the new. I give no judgment upon that point; but what was done in this case was clearly wrong.

PLATT, B. I am of the same opinion. This case is exempted out of the repeal of the 2 Will. 4, c. 39, by the 26th section.

*Rule absolute, with costs.*¹

THOYTS and another, assignees of GODDARD, an insolvent, v. HOBBS.²

May 29, 1852.

Insolvency — Conveyance — Petition — Protection from Process — Misdirection.

A tenant being indebted to his landlord for rent, and being in insolvent circumstances, proposed to and executed to the defendant, in April, 1850, a bill of sale of his farming stock and furniture; and in June, 1851, petitioned the Insolvent Court for protection from process. The 7 & 8 Vict. c. 96, s. 19, after making void certain voluntary conveyances by

¹ On the 23d of November, the same point was decided in the Court of Queen's Bench in the case of—

PIGOT v. JACKSON.

In which case a rule had been obtained to rescind an order of Crompton, J., setting aside the judgment and execution on the ground of irregularity. The writ of summons was issued on the 22d of September; appearance *sec. stat.* was entered on the 1st of October; and on the 26th of October the plaintiff proceeded under the provisions of the 28th section of the Common Law Procedure Act, filing an affidavit of personal service of the writ of summons, and a declaration indorsed with a notice to plead in eight days; and at the expiration of that time signed judgment for want of a plea, and issued execution; not having given the defendant any notice of the filing of the declaration.

Macnamara showed cause, citing the above decision.

Steen, in support of the rule, argued that there was a material distinction between an appearance entered under the statute by the plaintiff for the defendant and an appearance by the defendant; and that in the present case there was a non-appearance by the defendant, within the meaning of the 18th section. He also referred to the 62d section.

[LORD CAMPBELL, C. J. That only applies to a rule to plead or a demand of plea.]

Per Curiam. The rule must be discharged.

² 21 Law J. Rep. (N. S.) Exch. 340.

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parties in insolvent circumstances, provides, that no such conveyance shall be deemed void if made prior to three months before filing the petition, and not with the view or intention by the party so conveying of petitioning the court for protection from process. The judge directed the jury to consider whether the insolvent executed the bill of sale with the view or intention of petitioning the Insolvent Court for protection at any time when he might apprehend proceedings would be or were taken against him :—

Held, that this was a misdirection; the question being, not whether the insolvent had a general intention at some future time of petitioning the Insolvent Court, but whether he had the present intention of so doing.

ASSUMPSIT, for money had and received, to the use of the insolvent.
Second count, for money had and received, to the use of the plaintiffs as assignees.

Plea. *Non assumpsit.*

At the trial, before Wightman, J., at the last Berkshire spring assizes, the facts were these :— F. Goddard, the insolvent, being indebted to his landlord in a large sum of money, for rent, which he was pressed to pay, and being in insolvent circumstances, and unable to pay the same, proposed to and executed to the defendant, in April, 1850, a bill of sale of his farming stock and household furniture, which the latter took possession of, and sold in the following month. Goddard, after the bill of sale, lived in the house of the defendant. The insolvent being afterwards sued by the plaintiff in the county court, petitioned that court for protection as an insolvent, in June, 1851; and his case was heard in August. The case for the plaintiffs was, that the assignment was fraudulent and void, within the 7 & 8 Vict. c. 96, s. 19. On the other hand, it was contended for the defendant, that the case fell within the proviso of that section, and that the conveyance was not made by the insolvent “with the view or intention” “of petitioning the court for protection from process.” The learned judge directed the jury to consider whether the bill of sale was executed by the insolvent, with the view or intention of petitioning the Insolvent Court for protection at any time when he might apprehend proceedings would be or were taken against him. The jury answered both questions in the affirmative, and found a verdict for the plaintiffs.

A rule *nisi* having been obtained for a new trial, on the ground of misdirection,

Alexander and Griffiths showed cause. The judge rightly directed the jury, for all the facts showed that the insolvent could have had no other intention than that of petitioning the Insolvent Court. In *Aldred v. Constable*, 4 Q. B. Rep. 674; s. c. 12 Law J. Rep. (N. S.) Q. B. 253, it was held, that a fraudulent preference in contemplation of bankruptcy might be inferred by a jury from circumstances, without proof that a distinct act of bankruptcy was contemplated. That is an analogous case.

[MARTIN, B. In *Morgan v. Brundrett*, 5 B. & Ad. 289; s. c. 2 Law J. Rep. (N. S.) K. B. 195, it was held, that a party seeking to avoid a payment or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bankruptcy, must show not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy.]

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The insolvent must have known that he would be under the necessity of petitioning the Insolvent Court. The whole question depends upon the mind and intention of the party at the time of executing the bill of sale. *Gibson v. Muskett*, 3 Man. & G. 168; s. c. 11 Law J. Rep. (N. S.) C. P. 225. The insolvent must be taken to have contemplated the necessary effect of his own act.

[PLATT, B. The intention of the insolvent was merely to prefer the defendant to his landlord.]

Keating and *Pigott* were not called on.

POLLOCK, C. B. This rule must be absolute, on the ground of misdirection. I think there was no evidence from which the jury could be called upon to say that the insolvent had the intention of petitioning the Insolvent Court. But my judgment proceeds on the ground, that the question arising under the proviso in the 19th section of the act of parliament has not been correctly left to the jury. To render the conveyance void the party making it must have the present view or intention of petitioning the Insolvent Court. It is not enough that he has a general intention at some future time of freeing himself from his embarrassments by petitioning the court.

PLATT, B. I am of the same opinion. The conveyances spoken of in the former part of the 19th section are void, unless they fall within the proviso in the concluding part of that section. The only question, therefore, is, whether this transaction ranges itself under the proviso. It is argued that the insolvent must have contemplated insolvency, that he was in insolvent circumstances, that he must have intended the consequences of his own act, and that he was in the situation of a man about to become a bankrupt, whose conveyances and assignments are deemed to be made in contemplation of bankruptcy. There is, however, a distinction between the case of bankruptcy where proceedings were taken hostilely against the party, and the present case, where he acts voluntarily. Here the act of petitioning the court is the party's own act; he is not bound to petition, and, therefore, when the judge told the jury that the question was whether the insolvent had at any time the intention of petitioning the court, that direction was wrong. The statute contemplates that the act which he is to do is to be a valid one. He must not at the time have the intention of petitioning the Insolvent Court. The question was put by the judge upon the ground that the insolvent had the intention of applying contingently, and at some future time to the Insolvent Court. That direction was wrong.

MARTIN, B. I am of the same opinion. The question is, whether this is a valid bill of sale. Without doubt, Goddard could transfer his property in a valid and legal manner. He was entitled to prefer one creditor to another. Has this common law right been interfered with? It is to be observed that this act of the 7 & 8 Vict. c. 96, is not the Insolvent Debtors Act. It was made with a different intent.

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The 5 & 6 Vict. c. 116, enabled persons not being traders or being traders owing less than 300*l.* to present a petition to the Court of Bankruptcy. The act of the 7 & 8 Vict. c. 96, was intended to extend and amend that act. It enables a petition for protection from process to be presented to a Court of Bankruptcy; and then it enacts, in section 19, that if any petitioner shall, in contemplation of becoming insolvent, or being in insolvent circumstances, voluntarily convey his property to any creditor, such conveyance shall be deemed fraudulent and void^a as against his assignees; provided that no such conveyance shall be deemed fraudulent and void if made prior to three months before filing the petition, and not with the view or intention by the party conveying of petitioning the court for protection from process. My opinion is, that if a conveyance is executed more than three months before the filing of the petition, the party seeking to set aside that conveyance is bound to establish affirmatively the intention of petitioning the court for protection. I think the party in this case who executed the bill of sale did not think about protecting himself from process. His only intention was to avoid a distress on the part of his landlord. There is not a scintilla of evidence for the jury of the insolvent having the intention of petitioning the court for protection from process. This act of parliament must be construed strictly, and conveyances of this description are not to be set aside except upon legitimate grounds.

Rule absolute.

THE JUSTICES OF BEDFORDSHIRE, appellants, v. THE BEDFORD IMPROVEMENT COMMISSIONERS respondents.

THE JUSTICES OF BEDFORDSHIRE, and others, appellants, v. THE OVERSEERS OF THE POOR OF ST. PAUL, respondents.

THE GUARDIANS OF THE BEDFORD UNION, appellants, v. THE BEDFORD IMPROVEMENT COMMISSIONERS, respondents.

THE GOVERNORS OF THE BEDFORD INFIRMARY, appellants, v. THE BEDFORD IMPROVEMENT COMMISSIONERS, respondents.¹

April 28, and May 31, 1852.

Rate — 1. *Goal, Rating of* — *Goal Act*, 4 Geo. 4, c. 64, s. 48, *Construction of* — *Local Act*, 43 Geo. 3, c. 128.

2. *Houses of Governor and Wardens of Goal, Ratability of.*

3. *Union Workhouse, Ratability of* — *Public Building* — *Parliamentary and Parochial Tax.*

4. *Infirmary* — *Public Building* — *Meaning of words "in Front of," in Local Act.*

The 43 Geo. 3, c. 128 (local and personal), for improving the town of Bedford, enacts, section 59, that *is.* shall be assessed upon all goals, chapels, meeting-houses, schools, alms-

¹ 21 Law J. Rep. (N. S.) M. C. 224.

The Justices of Bedfordshire v. The Bedford Improvement Commissioners.

houses, and other public buildings, church-yards, chapel-yards, and meeting-house yards, within the said town, for every yard, running measure, of the length in front of such halls, gaols, &c. The Gaol Act, 4 Geo. 4, c. 64, s. 48, enacts, that every gaol for any county or town, &c., having exclusive jurisdiction of felonies and misdemeanors, which shall be situate within the limits of any other county or town, shall be taken to be part of the county or town for which it shall be used as a gaol, so long as it shall be so used. The county gaol of Bedfordshire is situate within the town of Bedford, and the front and part of the sides and the back part, the latter consisting of a boundary wall, abut upon public roads of the town. The commissioners under the local act assessed the county justices for the frontage of the fore part, of the back part, and of part of the sides of the gaol, measured in running yards:—

Held, that the gaol was not exempt from rating by reason of the 4 Geo. 4, c. 64, s. 48, as that section related merely to jurisdiction.

The houses of the governor and warders of a county gaol were built outside a wall inclosing an area, within which the gaol stood. The front door of the governor's house opened into the public street. There was an outlet through the back wall of the house to the area. The houses of the warders were similarly situated, but did not communicate by the back wall with the area. The governor and warders had the occupation of three houses only in respect of their being such officers, and the accommodation of their houses was not more than was proper and convenient for persons having their duties to perform; and their constant residence in their houses was an important part of their duties:—

Held, that they were not liable to be rated.

An union workhouse was erected by an incorporation of guardians, under the 34 Geo. 3, c. 98, the 19th section of which enacts "that all buildings to be erected by virtue of that act shall be free from all parliamentary and parochial taxes, except such and to such amount as they were assessed to, at the time they were first taken and applied." It was afterwards rented by the guardians of a poor-law union, formed under the 4 & 5 Will. 4, c. 76:—

Held, that the workhouse was a "public building" within the meaning of the above local act, and that it was liable to be rated under that act, the rate in question not being a "parliamentary or parochial tax" within the meaning of the 34 Geo. 3, c. 98.

An infirmary is a "public building" within the meaning of the local act.

In all the above cases, and the other subject-matters of rating mentioned in the local act, the rate ought to be imposed upon so much of the frontage of the several buildings and ground as abuts upon a public carriage-road or public footway.

In a special case, stated under the 12 & 13 Vict. c. 45, the parties supporting the affirmative (the respondents in the present cases) are entitled to begin.

THE JUSTICES OF BEDFORDSHIRE, appellants, v. THE BEDFORD IMPROVEMENT COMMISSIONERS, respondents.

April 28, 1852.

1. *Goal, Liability to be Rated and Mode of Rating — Goal Act, 4 Geo. 4, c. 64, s. 48, Construction of — Local Act, 43 Geo. 3, c. 128.*

IN this case the justices of the county of Bedford had been rated, in respect of the county goal, at the sum of 18*l.* 10*s.* 6*d.*, in respect of 247 yards of running measure of the length in front of the goal. The rate was made by the commissioners for the improvement of the town of Bedford, under two local acts of parliament. The justices appealed against the rate, stating as the grounds of the appeal, first, that the goal was not ratable at all under the local acts; secondly, that, if ratable, it ought to be rated for every yard, running measure, of the length in front of such goal.

The following case was, by judge's order, stated for the opinion of this court.

CASE. By an act of parliament (local and personal), 43 Geo. 3, c. 128, for improving the town of Bedford, certain commissioners (the respondents in this case) were empowered to make rates for the purposes of the act.

It is admitted, for the purposes of this appeal and case, that the said parish of St. Paul is situate within the borough of Bedford, which has a recorder, and to which a separate commission and a separate Court of Quarter Sessions of the Peace have been granted, and the jurisdiction of the justices of the borough is independent and exclusive of that of the justices of the said county; and that the appointment of commissioners of the poor of the said parish is, from time to time, made by the justices of the said borough only, and not by the justices of the said county.

By section 59 it is enacted, that the sum of 1s. and no more, shall yearly be rated and assessed upon all halls, goals, chapels, meeting-houses, schools, alms-houses (except the alms-houses founded by Christie Skinner, deceased) and other public buildings, church-yards, chapel-yards, and meeting-house yards, within the said town, for every yard, running measure, of the length in front of such halls, gaols, chapels, meeting-houses, schools, alms-houses, and other public buildings, church-yards, chapel-yards, and meeting-house yards; and the rates or assessments so to be made and laid upon the county hall, county gaol, or any other public county building shall be paid by the treasurer of the county of Bedford for the time being.

Until Michaelmas, 1819, the county prison comprised, as now, the common gaol and house of correction in one building, and having but one frontage, adjoining a public street, and was assessed to the improvement rate according to the linear measure per yard of its front adjoining that street, being the present frontage of St. Love's-street; and such rate was not disputed.

In 1819 the justices purchased the ground then occupying the space between the north-east side of the gaol, and Offa-street, upon which they erected a new house of correction, with an entrance from and fronting that street. From January, 1820, the said house of correction was used as a separate county prison, and was assessed to the improvement rate, according to the linear measure per yard of its frontage to Offa-street, and continued to be assessed yearly upon that scale until the rate in dispute was made.

In 1849 the county justices again brought the gaol and house of correction into one establishment, within one building, being the present county prison, commonly called the new prison, the subject of the appeal, by enlarging and adding various additional buildings to the old gaol; the gateway, porter's lodge, and governor's and warden's houses forming the front to St. Love's-street, and the only entrance to the new prison being from St. Love's-street by the above gateway.

The separate house of correction having become useless, was lately pulled down, and the site converted into a garden and airing ground for the purposes of the new prison, with a blank wall, about 20 feet high and 61 yards in length, bounding the frontage of, but without any entrance from, Offa-street.

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The north-west boundary wall of the new prison, for about 67 yards, adjoins a public road leading from St. Love's-street to Adelaide square. The south-east boundary wall, for about 33 yards, adjoins some ground of the Duke of Bedford, which was kept enclosed and used as a private way to his land, which was sold in building lots, in April, 1842, when the gate and enclosing fence were removed, and the ground before used only as a private way was left open for the use of the purchasers, and the public now use it as a road from St. Love's-street to Harper-street, and the commissioners repair it.

The rate in dispute is made upon the principle that the county is liable to be rated in respect of all parts of the prison estate adjoining to any public road, which the respondents consider ratable frontage, and not restricted to the front of the building; and, therefore, the linear or running measure stated in the rate includes not only the length or front next St. Love's-street, but the length of the blank wall now at the back of the prison, adjoining to and occupying the frontage of Offa-street, lately the front of the house of correction, and also so much of the side boundaries as adjoin the two roads before mentioned on the north-west and south-east sides.

It is contended by the appellants, first, that the county prison and appurtenances thereto belonging, are part of the county, under the 48th section of the 4 Geo. 4 (1824), c. 64, and, therefore, not ratable under the said local acts; and, secondly, that if the gaol be ratable, it can only be rated in respect of the length of its front to St. Love's-street. The point for the court to decide is, whether the appellants are liable to be rated in the said rate or assessment in respect of the county gaol; if they are not, the assessment is to be amended by striking out that portion of it which is set out in this case. If the court should decide that the appellants are ratable in respect of the said county gaol, then the amount of rate is to be ascertained on such principle as the court should determine, and the said portion of the rate shall be amended upon the said principle so determined by the court. In either case such costs to be paid as this court shall adjudge.

Worlledge (Mills with him), for the respondents. The gaol is ratable, notwithstanding the Gaol Act, 4 Geo. 4, c. 64, s. 48, the only effect of that act being, that gaols, &c., locally situated out of a jurisdiction are to be deemed part of that jurisdiction. The object of the act was, to empower the justices of the jurisdiction without the boundaries of which the gaol might be situated, to enter it all times. It was not intended by the legislature in a case like the present, to exempt the gaol from the payment of rates. Secondly, the appellants are liable to be rated in respect of the front, the back, and part of the two sides of the gaol. The words of the local act are, that gaols are to be rated "for every yard, running measure, of the length in front of such gaols," &c. The words "length in front" mean "frontage" towards public streets and roads, in the sense in which those words are used by builders. The case might be different if the

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words had been "length of the front." The justices are therefore ratable in respect of the fore, back, and part of the side frontage. (He was then stopped by the court.)

Tozer (*Pearse* with him), for the appellants. First, the effect of the 4 Geo. 4, c. 64, s. 48, is to take the gaol out of the borough of Bedford, for all purposes, and to place it within the county. Secondly, the appellants, according to the true construction of this local act, are to be rated in respect of the front of the gaol only where it abuts on St. Love's-street.

POLLOCK, C. B. The rate must be affirmed. The first question is as to the Gaol Act; and as to that act I think that it merely has reference to jurisdiction; and with respect to rating, leaves the gaol to be considered as situate within the parish of St. Paul, in the borough of Bedford. How, then, is the gaol to be rated? Looking at the objects of the local act of parliament, I think the words "in front of the gaol" mean that part of the gaol which would be frontage if there were doors and windows in it, and therefore, that that part of the gaol which abuts on public ways in the front, back, and sides of the gaol is to be considered liable to be rated. The appellants must, therefore, be rated for so many yards of the gaol as front towards any public street or way. The mode of rating is, therefore, correct, and judgment must be for the respondents, with costs.

PARKE, B. I am of the same opinion. The object of the section of the Gaol Act was merely to give jurisdiction to parties in respect of places locally situated out of the jurisdiction; in other respects gaols are left in the same situation as they were in before the act passed. With regard to the second point, although there is a little ambiguity in the language of the local act, I think, on the whole, the respondents are entitled to judgment. The gaol derives benefit from the paving, cleansing, and lighting which takes place close to it, and, therefore, it is reasonable that the justices should pay for the frontage towards the public roads, measured by yards. The authorities of the gaol may, if they think fit, have access to the front, back, or sides by means of doors and windows, and therefore they ought to pay whether they take advantage of their right or not. Here there is a frontage at the fore part, the back, and also at the sides of the gaol; and therefore that frontage measured in yards, must be paid for.

ALDERSON, B. I concur. The gaol, except for the purposes of jurisdiction, is to be considered as situated in the borough of Bedford. As to the other point, the justices are liable to be rated for the fore-side, and back frontage. The rate must be affirmed with costs.

MARTIN, B. I am of the same opinion. The gaol is totally situated in the town of Bedford, and the owners of it derive benefit from the paving, cleansing, and lighting which takes place in its vicinity.

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They must, therefore, be rated according to the mode adopted by the respondents.

Rate affirmed, with costs.

THE JUSTICES OF BEDFORDSHIRE, appellants, v. THE OVERSEERS OF ST. PAUL, respondents.

April 28, 1852.

2. Houses of Governor and Warders of Gaol, Ratability of.

THIS was an appeal against a poor-rate of the parish of St. Paul, Bedford, whereby C. Forster, J. Parsons, and J. Ferris were rated in respect of the occupation of three houses. Forster was governor, and Parsons and Ferris were warders of the gaol and house of correction for Bedfordshire. The county gaol of Bedford having been rebuilt in 1848, the houses of the said governor and warders were purposely constructed so as not to adjoin the gaol. The gaol and house of correction stand on an area surrounded by a high wall. Forster's house is on the left side of the prison gateway, outside the wall, the front door whereof opens on the public street. The house communicates by an outlet through the back wall with the said area. The houses of the warders are similarly situated, but do not communicate through the back wall with the area. All the appellants are in the exclusive occupation and enjoyment of the houses, with their wives and children. The governor and warders have the occupation of their houses only in respect that they are such officers, and the accommodation afforded by their houses is not more than is proper and convenient for persons having their duties to perform; and the constant residence of these officers within their houses is an important part of their duties.

The question for the court is, whether either of the above parties is liable to be rated.

Worlledge and *Mills* for the respondents, appearing to support the rate.

Tozer, for the appellants, contended that he was entitled to begin. [*Per Curiam*.¹ The parties supporting the affirmative, that is, the respondents, have the right to begin.]

Worlledge and *Mills* for the respondents. The governor and warders are liable to be rated for their houses, which are distinct from the gaol, and are in the nature of private residences. The governor has more accommodation than is necessary for him in his capacity of governor.

[*ALDERSON, B.* The governor of the gaol must reside somewhere. Here he lives outside the gaol, but he has access to the gaol from his

¹ POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

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house, which is built in such a manner as to allow him conveniently to visit the gaol.

MARTIN, B. It cannot be a criterion of the liability to be rated that the house is situated outside the gaol.]

The Queen v. Shepherd, 1 Q. B. Rep. 170; s. c. 10 Law J. Rep. (N. S.) M. C. 44, will be relied on by the other side.

[POLLOCK, C. B., mentioned *The King v. Bradford*, 4 M. & S. 317.

ALDERSON, B. In *The Queen v. Shepherd*, the house of the appellant was necessary for the due discharge of the duties of the office of governor of the gaol. The party was not ratable for it, as he occupied it in connection with his office. The case would have been different if the house had been given to him as something additional.]

The King v. Terrott, 3 East, 506, is in point.

Tozer and Pearse, for the appellants, were not called upon.

Per Curiam. There must be

Judgment for the appellants, with costs.

THE GUARDIANS OF THE BEDFORD UNION, appellants, v. THE BEDFORD IMPROVEMENT COMMISSIONERS, respondents.

May 31, 1852.

3. *Union Workhouse, Ratability of* — 34 Geo. 3, c. 98, s. 19 — *Public Building — Parliamentary and Parochial Tax.*

In this case the guardians of the poor of the Bedford Union appealed against the rate of the Bedford Improvement Commissioners, on the grounds that the union workhouse was not ratable, and that the principle of rating was incorrect. It appeared from the special case, which was stated by judge's order, that under the 34 Geo. 3, c. 98, certain persons were incorporated as guardians of the poor of Bedford. That they purchased land and erected a house, called "The Bedford House of Industry." The 19th section of that act enacts, that "all buildings to be erected by virtue of that act shall be free from all parliamentary and parochial taxes, except such taxes and to such amount as they shall be assessed at, at the time they shall be first taken and applied for the purposes of the act." A poor law union was afterwards formed under the 4 & 5 Will. 4, c. 76, which rented the House of Industry from the Bedford guardians.

The question turned upon whether the Bedford Union Workhouse was a "public building" within the 59th section of the local act, 43 Geo. 3, c. 128;¹ whether it was exempt from all parochial and parliamentary taxes, except to such an amount as it was assessed at, at the time the building was first taken and applied for the purposes of the

¹ See the preceding case.

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act; and lastly, whether the principle of rating as regarded the front age was correct. The rate was made on the principle that the appellants were liable to be rated in respect of the whole of the south and north-west sides of the premises; on the south side as being the actual front of the building, and the north-west side as adjoining a public road.

Worlledge, for the respondents. The union workhouse is a public building within the 59th section of the 43 Geo. 3, c. 128; it is not exempt from rating under that act, and the principle adopted by the commissioners is the correct one. (He was then stopped.)

Pearse, for the appellants. The union workhouse is liable to be rated at such amount only as it was liable to be rated at under the 34 Geo. 3, c. 98. *Williams v. Pritchard*, 4 Term Rep. 2, is in point. There houses, built on lands embanked from the Thames, in pursuance of the 7 Geo. 3, c. 37, which vests those lands in the owners free from taxes, were held not liable to be assessed to the general land taxes imposed by the 27 Geo. 3, though such act was conceived in general terms, and was subsequent in point of time to the act creating the exemption. *Palmer v. Earith*, 14 Mee. & W. 428; s. c. 14 Law J. Rep. (N. S.) Exch. 256, is in point. The tax imposed by the local act is a tax fixed by act of parliament; it is a parliamentary tax. [ALDERSON, B. This is neither a parochial nor a parliamentary tax.]

Per Curiam. The rate must be amended, without costs, by confining it to the front of the building next to the public road.

Rule amended, without costs.

THE GOVERNORS OF THE BEDFORD INFIRMARY, appellants, v. THE BEDFORD IMPROVEMENT COMMISSIONERS, respondents.

May 31, 1852.

4. *Infirmary — Public Building — 43 Geo. 3, c. 128, Local Act — “In Front of,” Meaning of.*

THIS was an appeal against a rate made by the Improvement Commissioners of the town of Bedford, whereby the governors of the Bedford General Infirmary were rated to the poor, in respect of the Infirmary yard and Fever Hospital, for 381 yards, running measure, of the length in front. The governors appealed to the sessions against the rate, stating as grounds of the appeal, first, that the infirmary and hospital were not ratable at all; secondly, that if they were ratable, they ought to be rated for every yard, running measure, of the length in front of such infirmary. The 43 Geo. 3, c. 128, the Bedford Improvement Act, local and personal, enacts, sect. 59, that 1s. (raised by a subsequent act to 1s. 6d.) “shall be rated upon all halls, gaols, chapels,

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meeting-houses, schools, alms-houses (except the alms-houses founded by Christie Skinner, deceased), and other public buildings, church-yards, chapel-yards, and meeting-house yards, within the said town, for every yard, running measure, of the length in front of such halls, gaols, chapels, meeting-houses, schools, alms-houses, and other public buildings, church-yards, chapel-yards, and meeting-house yards."

Worlledge, for the respondents. First, this is a "public building" within the meaning of the local act. It is *ejusdem generis* with those previously enumerated in the section. It is in the nature of an almshouse. Secondly, the principle on which the rate was imposed is correct. The commissioners are entitled to measure as frontage any portion of the infirmary that they can measure without being trespassers. They may measure wherever there is a public way whereon the building abuts. To hold that a front next a footway is not ratable, but that a front next a public carriage-road is, would violate all principle, and introduce difficulties into the construction of the act of parliament. The act makes no distinction between footways and carriage-roads.

Pearse, for the appellants. The infirmary in this case is not a "public building" *ejusdem generis* with those mentioned in the act of parliament. The parties rated are the governors of the infirmary, and they are not the proper parties to be rated. Secondly, the ratable frontage is that portion only which comprises the area of the building; the land surrounding the building and not comprised within it ought not to be rated. That part only which abuts upon the public carriage-road is ratable.

POLLOCK, C. B. I am of opinion that the rate ought to be levied by taking the measure of so much of the ground of the infirmary as abuts on the public carriage-road, and so much as abuts on the north-east on the public footway. Two points are raised in this case. First, whether this is a building which ought to be rated at all; secondly, upon what principle the rate ought to be imposed? With respect to the first point, it is true that no hospital or infirmary, or other building of that sort, is mentioned in the local act; nor is the machinery by which, or the persons upon whom the rate is to be imposed, specifically pointed out by the section applicable to the case. It is clear, however, that it was not intended to limit the rate to buildings beneficially occupied. [His lordship read the 49th section.] If this infirmary be not a public building, I do not know what is. Then as to the mode of rating it. I was struck with the remark that the act makes no distinction between footways and carriage-ways. But I find that the corporation of Bedford are liable to pay 1s. per yard in respect of ways, some of which may be footways and some carriage-ways; and they are to pay an uniform rate, so that no distinction is taken between public footways and public carriage-roads. The rate must be amended, by making the governors liable to pay in respect of the south-east frontage abutting on the turnpike road,

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and of the north-east frontage abutting on the public footpath. The parties will pay their own costs.

ALDERSON, B. I am of the same opinion. As to the first point, I think this infirmary as much a "public building" as a school or almshouse, neither of which is privileged to all the public. Church-yards and meeting-yards may be yards having no building within them, and they may have no aperture, except for the purpose of admitting funerals. But that circumstance can make no difference. This case is essentially within the principle of the case which was decided last term, and in the correctness of which decision I concur. The rate must, therefore, be affirmed as to part, and amended as to the other part.

PLATT, B. I think this is a public building; and then the only question is, how it is to be rated? In respect to gaols, some are circular, but under the language of such an act as this they would be rated without reference to what might be strictly considered a front. We are bound by the decision of this court last term on the subject of the gaol. There is very good reason for holding that the road on every side of a public building should regulate the rate, because the road on every side of the building has to be lighted, watched, and repaired.

MARTIN, B. This is a public building devoted, not only to the inhabitants of Bedford, but to any others who may be brought there. It is a public building within the meaning of the local act of parliament. We are bound by our judgment in the case decided last term relating to the gaol. The rate must be amended, by confining it to so much of the infirmary as fronts the turnpike-road on the south-east, and to so much as is bounded on the north-east by the public footway. There will be no costs on either side.

Rate amended accordingly, without costs.

TODD v. KERRICH.¹

November 13, 1852.

Master and Servant — Domestic Servant — Governess — Month's Warning.

A governess is not within the rule applicable to menial or domestic servants, that upon

¹ 22 Law J. Rep. (N. S.) Exch. 1. Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

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a general hiring, the service may be determined by a month's notice or payment of a month's wages.

• ASSUMPSIT for the residue of a year's salary alleged to be due to the plaintiff for services as governess in the defendant's family. Plea, *non assumpsit*.

At the trial, before Jervis, C. J., at the summer assizes at Guildford, there was a conflict of evidence as to the period for which the engagement was made, which it is not material to state, as the plaintiff obtained the verdict, with leave to the defendant to move to enter a nonsuit, if the plaintiff was liable to be discharged at a month's notice or with a month's wages, in accordance with the rule as to menial or domestic servants.

E. James now moved accordingly. The custom as to menial or domestic servants is established, that on a general hiring the term of service is for a year, subject to the right of either party to determine the engagement by a month's notice, or payment by the master of a month's wages if no such notice is given. A governess resides in the house. He referred to *Beeston v. Collyer*, 4 Bing. 309; s. c. 5 Law J. Rep. C. P. 180; *Nowlan v. Ablett*, 2 Cr. M. & R. 54; s. c. 4 Law J. Rep. (N. S.) Exch. 155. The verdict was also against the evidence.

Cur. adv. vult.

The judgment of the court was now delivered by —

POLLOCK, C. B. In this case, which was tried before my Lord Chief Justice Jervis, we think there ought to be no rule. We are of opinion that the point which was reserved was, whether a governess is within the rule as to menial or domestic servants; and we are of opinion that a governess is not within the rule or custom as to menial or domestic servants. The position in which a governess is placed, the station which she occupies in a family, the manner in which usually such a person is treated in society, certainly place her in a very different situation from menial or domestic servants. We think, as far as it is a matter of law, and that must have been the point reserved, that a governess is not within the rule as to menial and domestic servants. And treating the application as a verdict against evidence, the learned judge before whom this case was tried is not dissatisfied with the verdict. We have read the notes which he has furnished to us, and we are not dissatisfied, and therefore we think there ought to be no rule.

Rule refused.

Key v. Cotesworth.

KEY and others v. COTESWORTH and others.¹

May 8, 1852.

Stoppage in Transitu — Bills drawn against Consignments.

In 1845, the defendants, commission agents in London, wrote to the plaintiffs, merchants at Madras, as follows: — "At the request of Messrs. K. & L., of Glasgow, we beg to open a credit in your favor to the extent of 1,500*l.*, to be applied to the execution of an order they have given you for Madras handkerchiefs, and for cost of which, as produced, you draw on us at the customary date, on forwarding bills of lading to our order." Two orders were subsequently given by K. & L., and executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills drawn on them in pursuance of the letter. In February, 1847, K. & L. wrote to the plaintiffs, with a third order: — "You will draw for cost and consign goods as before." The plaintiffs accordingly shipped the goods on account of K. & L., and sent to the defendants the invoice and bill of lading, enclosed in a letter, saying, "We have, as usual, drawn upon you at six months, for the equivalent of the amount of invoice." The bill of lading stated the goods to have been "shipped by the plaintiffs, and to be deliverable to the defendants or their assigns on payment of freight." The invoice stated that the goods were "consigned to the defendants, on account and risk of K. & L." The defendants received the bill of lading and invoice together, on the 26th of August, and the goods arrived in London on the 21st of October. On that day the plaintiffs' agent received a bill drawn upon the defendants against the goods, but, on presentment, the defendants refused to accept it. On the 27th of October, K. & L. stopped payment. The defendants took possession of the goods under the bill of lading, and sold them, and retained the proceeds. On the 4th of March, 1848, the plaintiffs gave the defendants notice that they claimed to stop the goods *in transitu*, the bills not having been accepted. In an action to recover the proceeds of the sale as money received to the use of the plaintiffs: —

Held, first, that it was a question for the judge, and not for the jury, to decide what the contract between the parties was.

Secondly, that the property in the goods vested absolutely in K. & L. upon the delivery on board the ship, and transmission of the bill of lading to the defendants: the acceptance of the bill not being a condition either precedent or subsequent.

ASSUMPSIT for money received by the defendants for the use of the plaintiffs.

Plea, *non assumpserunt*, upon which issue was joined.

At the trial before Martin, B., at the London sittings after Trinity term, 1851, it appeared that the action was brought to recover the sum of 671*l.* 15*s.* 9*d.*, being the proceeds of two cargoes of Indian silk handkerchiefs consigned by the plaintiffs, merchants at Madras, carrying on business under the firm of Binney & Co., to the defendants, merchants in London, under the following circumstances, which were mainly admitted on both sides. In the year 1845, Messrs. Kilgour & Leith, merchants at Glasgow, were desirous, through the defendants, their London agents, of procuring Indian silk handkerchiefs from the plaintiffs at Madras; and accordingly, on the 7th of August, 1845, Kilgour & Leith wrote to the defendants as follows: "We beg to acknowledge the receipt of your favors of the 31st ult. and the 5th inst. We find it does not answer your views to execute our friends' order for Indian goods. We thought you would

have considered this not as an isolated transaction, but as one connected with our account and that of our friends, whose other business we have directed to come through your house, and which will extend to 12,000*l.* or 15,000*l.* per annum. It certainly will take some time before the first order can be brought forward, but afterwards the same quantity would be required every three or four months. We did not think the liability great, as the goods would, of course, remain under your control till settled for. However, to save all trouble in the ordering, &c., we have arranged to have the goods made in Madras, and shipped from thence to England. We presume you will take them as a consignment, and on receipt of bill of lading, accept for same. We will thank you to say as to this soon." In answer to that letter, the defendants, on the 9th of August, wrote to Kilgour & Leith in these terms:—"We will answer your proposition, respecting the credit for the purchase of Madras handkerchiefs; in the mean time please to inform us at what date your friend would draw on us for the rest; whether you contemplate putting us in funds at their maturity, or do you intend the credit we have granted to you to be made available in part for this business?" On the 11th of August, Kilgour & Leith wrote to the defendants as follows:—"The drafts for the Indian goods would be at six months' sight, and accompanied by bill of lading. We propose you accept for these goods, as against a consignment of produce; we providing funds at maturity, or before, if reshipped to the West Indies. We do not intend that the credit we have at present with you shall be made available for this business; we want the handkerchiefs to represent the draft against them till shipped for our friends in the West." On the 18th of August the defendants wrote to Kilgour & Leith in these terms:—"With reference to the credit you require for the cost of India goods to be ordered from Madras, we are willing to grant it to you, knowing the firm to whom you transmit the order. We will send you the necessary letter of credit." On being informed that the plaintiffs were the persons to whom Messrs. Kilgour & Leith desired the letters of credit to be given, on the 17th of September the defendants wrote to the plaintiffs as follows:—"At the request of Messrs. Kilgour & Leith, of Glasgow, we beg to open a credit in your favor to the extent of 1,500*l.*, to be applied to the execution of an order they have given you for Madras handkerchiefs; and for cost of which, as produced, you may draw on us at the customary date, on forwarding bills of lading to our order, and timely orders for insurance." On the 7th of November, the plaintiffs wrote to the defendants:—"We have the pleasure to acknowledge the receipt of your letter on the 17th of September, handed to us by Messrs. Scott, Bell & Co., authorizing us to draw on you to the extent of 1,500*l.*, in execution of an order for handkerchiefs, on account of Messrs. Kilgour & Leith, of Glasgow. We shall gladly avail ourselves of this authority, shipping the goods to your order, and giving you timely advice, that you may effect insurance on your side." The plaintiffs accordingly executed the order, and forwarded the goods and bill of lading to the defendants, who received, accepted, and paid the bills drawn on them,

in accordance with the letter of the 17th of September, to the extent of 1,500*l.* therein mentioned; and this transaction was closed.

On the 5th of February, 1847, Messrs. Kilgour & Leith addressed a letter to the plaintiffs, which was as follows:—“Enclosed are patterns of a third order for handkerchiefs, which we will thank you to have put in hand immediately on receipt. This order has been too long delayed, and if you can, by any means, hurry execution, we will feel particularly obliged; you will draw for cost and consign goods as before.” The patterns were enclosed, together with a detail of the order. The plaintiffs executed the order therein contained, and the goods ordered were shipped for England in two vessels, the *Providence* and the *Essex*; the goods by the *Providence* were shipped on the 21st of August, 1847, and they, as well as the goods shipped by the *Essex* were stated in the admissions to have been shipped on the said order, and on the account of Messrs. Kilgour & Leith, and the bill of lading was dated the 21st of August, and was in the usual form. It stated the goods to have been shipped by the plaintiffs, and to be deliverable to the defendants or their assigns on payment of the freight. Upon the same day the plaintiffs addressed the following letter to the defendants:—“By desire of our mutual friends, Messrs. Kilgour & Leith, of Glasgow, we beg to hand you herewith invoice and bill of lading for nine cases of Madras handkerchiefs, shipped in the *Providence*, Capt. S. Hicks, to your address, and against which we have, as usual, drawn upon you at six months, for the equivalent of the amount of invoice in 369*l.* 2*s.* 1*d.*, being at the current exchange of 2*s.* per rupee, and which, no doubt, will be duly protected. These goods have been placed in a cabin to prevent the chance of their sustaining injury from the cargo; and as they have not been insured, we trust you will cover the risk on your side.” The bill of lading and invoice mentioned in this letter were enclosed, and the letter and its contents received by the defendants on the 26th of October in due course. The heading of the invoice was as follows: “Madras, 26th of August, 1847. Invoice of nine cases of Madras handkerchiefs, shipped by the undersigned, Messrs. Binney & Co. (the plaintiffs), on board the *Providence*, Capt. Hicks, consigned to Messrs. Cotesworth, Powell & Pryor, London, on account and risk of Messrs. Kilgour & Leith of Glasgow.” The goods by the *Essex* were shipped on the 9th of October. A bill of lading indorsed in blank by the plaintiffs, and invoice substantially in the same form as the above, were enclosed in a letter from the plaintiffs to the defendant, dated the 12th of October, which was received by the defendants on the 22d of November, and the letter was as follows:—“By desire of our mutual friends, Messrs. Kilgour & Leith, of Glasgow, we have the pleasure to hand you herewith invoice and bill of lading for eight cases of Ventapollan handkerchiefs, shipped in the *Essex*, Capt. W. N. Howard, to your care, and we have, as usual, drawn upon you at six months for the equivalent of the amount of invoice in 302*l.* 13*s.* 8*d.*, being at the current exchange of 1*s.* 11 1-2*d.* per rupee, and which will doubtless meet due honor. We leave the insurance to be effected on your side.” On the 27th of October, Messrs. Kilgour &

Leith stopped payment. The goods by the Providence arrived in London upon the 21st of October, the goods by the Essex about the 3d of March, 1848. Both parcels were received by the defendants under the bills of lading and were both sold by them, and the proceeds, amounting to 67*l.* 16*s.* 9*d.*, sought to be recovered in this action received by the defendants. Kilgour & Leith were before, at the time, and still are, indebted to the defendants upon a balance of account in a larger sum. On the 21st of October, Scott, Bell & Co., the plaintiffs' correspondents in London, having received the bill drawn against the goods by the Providence, caused it to be presented, for acceptance, to the defendants, who ultimately refused to accept it. The second bill was also presented for acceptance on the 22d of November, and dishonored; and both bills were duly protested. On the 4th of March, 1848, Messrs. Oliverson & Company, the plaintiffs' attorneys, addressed the following letter to the defendants: — "We have been directed, on behalf of Messrs. Binney & Co., of Madras, to give you notice that, in consequence of the insolvency of Messrs. Kilgour & Leith of Glasgow, on whose account they shipped the under-mentioned goods, they claim to stop the said goods *in transitu*. We understand that bills of exchange were drawn, by Messrs. Binney & Co., upon you in payment of the invoice cost of these goods, and that you have refused to accept these drafts, but still have a wish to retain the property. Messrs. Binney & Co. are advised, that, as you have thus refused to fulfil the terms upon which the goods were consigned to you, and as the goods themselves never have reached the insolvents' house, on whose behalf they were shipped, the *transitus* is not at an end, and the right of stoppage still subsists. The goods, therefore, are claimed on behalf of Messrs. Binney & Co., who are willing, and we hereby, on their behalf offer to pay you any claim for freight or otherwise whereof you may legally have a claim upon the goods. We give you this notice preparatory to such steps being taken on behalf of Messrs. Binney & Co., as may be advised to be proper to enforce the delivery of the property, and it is conceived that if there be any question of the right of stoppage *in transitu*, there can be no doubt that you can have no right to retain the property when you refuse to honor the bills drawn against such property. Messrs. Binney & Co. have remitted the triplicate bills of lading and Messrs. Kilgour & Leith's original letter of orders." The defendants refused to deliver up the goods or accept the bills, or to pay the invoiced price. The plaintiffs thereupon commenced this action. It was contended at the trial, on behalf of the plaintiffs, that the sale of the handkerchiefs was a sale on a condition either precedent or subsequent, that the defendants should accept the bills drawn on them in respect of the handkerchiefs, and that, by their refusal to accept, the condition precedent was never performed, and the property and right of possession remained in the plaintiffs; and that, at all events, the sale was subject to the condition subsequent, that the defendants should accept the bills, and if not, the property should revert, which condition having been broken, the plaintiffs became entitled to the goods or their proceeds; and that whether the sale

was on a condition or not was a question for the jury, and ought to have been left to the jury. His lordship was of opinion that there was no question for the jury, and nonsuited the plaintiffs.

F. Thesiger, in the following term, obtained a *rule nisi*, to set aside the nonsuit, and for a new trial, against which —

Knowles and *Willes* showed cause.¹ The plaintiffs had ceased to have any interest in the goods. *Kilgour & Leith* must have sustained any loss during the voyage, for the goods were shipped on their account and risk; they had both the property and right of possession. *Alexander v. Gardiner*, 1 Bing. N. C. 671; s. c. 4 Law J. Rep. (N. S.) C. P. 223. By indorsing the bills of lading they would have transferred the goods to the indorsee. *Lickbarrow v. Mason*, 2 Term Rep. 63. The plaintiffs cannot, therefore, recover the proceeds of the sale as money received for their use. The acceptance of the bills by the defendants was not a condition precedent to the vesting of the property in *Kilgour & Co.* By the transmission of the bills of lading, *Kilgour & Co.* were enabled to deal with the goods as their own. In *Wilmshurst v. Bowker*, 7 Man. & G. 882; s. c. 12 Law J. Rep. (N. S.) Exch. 475, a quantity of wheat was sold, to be paid for by banker's draft, in London, at two months, to be remitted by the vendee, on receipt of the invoice and bill of lading; and it was held in the Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that by the delivery of the wheat on board the vessel, for the account and at the risk of the vendee, and the transmission of the bill of lading indorsed by the vendor, the latter had parted with his property and right of possession, and could not stop the wheat *in transitu*, on failure of the vendee to remit the banker's draft. There was no evidence before the jury of any condition, and the court must determine the meaning of the contract. *Hutchinson v. Bowker*, 5 Mee. & W. 535; s. c. 9 Law J. Rep. (N. S.) Exch. 24; *Neilson v. Harford*, 8 Mee. & W. 806; s. c. 11 Law J. Rep. (N. S.) Exch. 20; 1 Taylor on Evidence, p. 42; *Howes v. Ball*, 1 Man. & Ry. 288; s. c. 6 Law J. Rep. K. B. 106; *Brandt v. Boulby*, 2 B. & Ad. 932; s. c. 1 Law J. Rep. (N. S.) K. B. 14, were also referred to.

• *F. Thesiger* (*The Attorney-General*), and *Montague Smith*, in support of the rule. The contract between the parties was only conditional, and until the acceptance of the bills, no property in the goods vested in the consignees. This question should have been left to the jury, as the contract did not altogether depend upon written documents. The assignment of the bill of lading does not confer any right of property or possession in the goods, but is merely evidence that such right has been acquired. *Blackburn on Contracts*, p. 279, *Mitchel v. Ede*, 11 Ad. & E. 888; s. c. 9 Law J. Rep. (N. S.) Q. B. 187. The jury may look at all the circumstances and determine the

¹ January 17, and April 27, before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

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nature of the contract. *Van Casteel v. Booker*, 2 Exch. Rep. 691; s. c. 18 Law J. Rep. (N. S.) Exch. 9. The previous transactions between these parties showed the actual contract, for the order of the 5th of February expressly referred to them:—"You will draw for cost, and consign goods as before." The first transaction was conditional, as shown by the letter of the 17th of September, 1845, and the drawing against the consignment. The jury should have decided whether it was a condition precedent, defeating the transfer, or a condition subsequent, revesting the property on the non-acceptance. In *Wilmshurst v. Bowker*, Lord Abinger, C. B., says, "We accede to the general principle laid down by the court below; and if the facts had been before a jury, we are not prepared to say that they might not have drawn the inference that the remitting of a banker's draft was a condition precedent to the vesting of the property in the wheat in the plaintiffs."

Cur. adv. vult.

The judgment of the court was now delivered by—

PARKE, B. [After stating the facts, his lordship proceeded:] It was contended at the trial, on behalf of the plaintiffs, that the sale of the handkerchiefs was a sale on a condition, either precedent or subsequent, that the defendants should accept the bills drawn on them in respect of the handkerchiefs; that, upon their refusal to accept, the condition precedent was never performed, and the property in the handkerchiefs never passed out of the plaintiffs, and that they were, therefore, entitled to them or their proceeds; and that if this were not so, at all events, it was subject to the condition subsequent, that the defendants should accept the bills; and, if not, the property should revert, which condition was broken; so that thereby the plaintiffs became entitled to the goods or their proceeds; and whether the sale was on a condition or not, was a question for the jury, and ought to have been left to them.

On the other hand, it was contended, on behalf of the defendants, that it was not a sale upon a condition at all, that it was an absolute sale by the plaintiffs to Messrs. Kilgour & Leith, and that upon the shipment of the goods by the plaintiffs on account and risk of Messrs. Kilgour & Leith, followed up by the transmission of the bills of lading to the defendant, one bill of lading making them the consignees, and the other the indorsees, the property and possession absolutely vested in Kilgour & Leith, and these goods thereby became theirs, and were at their sole risk, and they, and they alone, were entitled to them and their proceeds, and that if the plaintiffs had any right of action against the defendants (which on their part was denied), it was upon a contract to accept the bills to be implied from the acceptance of the goods, with notice of the contents of the letters of the 21st of August and the 12th of October; and that whether it was a sale upon a condition or not, was a question of law for the judge and not one of fact for the jury.

The entire case, so far as related to the contract of sale, being con-

tained in written documents, and the parties never having had any personal communication with each other, the learned judge was of opinion that there was no question for the jury in this case, and that it was for him to decide what the contract was, and he thought the sale to Messrs. Kilgour & Leith was an absolute, not a conditional one; that the property vested in them upon the delivery on board the ship, and the transmission of the bills of lading to the defendants, and that the plaintiffs could not maintain the present action against the defendants, who have received the goods and disposed of them under the authority of Kilgour & Leith, and could not bring an action for the proceeds; and by his direction the plaintiffs were nonsuited. We are of opinion that the ruling of the learned judge was correct. We think that the question, what was the contract between the parties, was, in this case, entirely one of law for the judge to decide upon, nor was there any evidence of usage to which the letters refer, which would be matter to be left to the jury. Looking at the written documents alone, the learned judge was quite right in the view he took at the trial, that the property vested by the transmission of the bills of lading in the manner described to the defendants, with the invoices at the same time. If it had been the intent of the vendors to preserve their right in that property until the bill drawn against it was accepted, they ought to have transmitted the bills of lading indorsed in blank to an agent to be delivered over only in case the acceptance took place. Having delivered them without that qualification, the property vests in Kilgour & Leith, or the defendants as their agents.

Our judgment in this case is in conformity with that of the Court of Exchequer Chamber, in the case of *Wilmshurst v. Bowker*; but there is a passage in the judgment of Lord Abinger, which was much relied on by the learned counsel for the plaintiffs. The circumstances of the two cases are very similar; and Lord Abinger stated, if the facts had been before a jury, he was not prepared to say that they might not have drawn the inference that the remitting of the bankers' draft, the mode of payment agreed on in that case, was a condition precedent to the vesting of the property. In that case, there may have been some particular facts to go the jury, but at all events, it was only the *obiter dictum* of Lord Abinger. It is sufficient to say, for the reasons before given, we think that in this case there was no question of fact as to the contract to be submitted to the jury. Several other cases were cited on collateral points, to which it is unnecessary to refer. The rule is, therefore, discharged.

Rule discharged.

Lumley v. Gye.

LUMLEY v. GYE.¹

November 12, 13, 24, 1852.

Common Law Procedure Act — Demurring and Pleading.

Where a party applies for leave to plead by way of traverse, and demur to the same pleading, under the 15 & 16 Vict. c. 76, s. 80, he ought to swear that the allegations proposed to be traversed are untrue.

Semble — that in such cases if the facts are within his own personal knowledge, he must swear positively to that effect; if not, then that he is so informed and believes; and if a third person is vouched he should show either that he has made inquiry of that person, or that it would be impossible or inconvenient to do so.

In an action on a contract the court allowed the defendant both to plead and demur to the declaration, although the validity of the contract had been affirmed on a motion for an injunction in the Court of Chancery, to which the defendant was a party, and in the decision of which court he had acquiesced.

THE declaration alleged that the plaintiff, being the proprietor and manager of a theatre called Her Majesty's Theatre, wherein operas and other entertainments of the stage were used and accustomed to be represented and performed, &c., on the 9th of November, 1851, contracted with one Joanna Wagner to sing and perform in certain operas and parts in operas at his said theatre, for the profit and advantage of the plaintiff, for three months, to date, from the 1st of April, 1852, upon certain terms then agreed upon between them; and afterwards, on the 18th of March, 1852, further agreed with the said Joanna Wagner, at her request, that the commencement of the said three months should be postponed until the 15th of April in the same year, of all which the defendant had notice; yet the defendant well knowing the premises, whilst the said contract was in full force, and before the 15th of April, 1852, wrongfully, and in violation of the said contract, on the 5th of April, 1852, entered into an agreement with the said Joanna Wagner, inconsistent with the said contract with the plaintiff, to sing and perform at another theatre of and belonging to the defendant, called the Royal Italian Opera, Covent Garden, where operas and other entertainments of the stage were represented and performed, for the space of two of the said three months during which she had so contracted with the said plaintiff to sing and perform at his said theatre as aforesaid, by which the said Joanna Wagner would be prevented from singing and performing at the plaintiff's theatre according to her contract; and on and after making his said agreement with the said Joanna Wagner, and also after the said defendant well knew that the said Joanna Wagner was bound by her said contract with the plaintiff, to sing and perform at his said theatre according to her said contract, wrongfully counselled, aided, and assisted the said Joanna Wagner to refrain from singing and performing at his said theatre according to her said contract; and also contracted and

¹ 22 Law J Rep. (N. S.) Exch. 9; 16 Jur. 1048.

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agreed with the said Joanna Wagner to indemnify her against all loss, costs, and damages which she might sustain or be put unto by reason of her breaking her said contract with the said plaintiff. It then averred that the said Joanna Wagner, in consequence of such acts of the defendant, did not appear, or sing, or perform at the said theatre of the plaintiff during any part of the said three months, although the said Joanna Wagner could and might, during all that time, have done so, according to the terms of her said contract with the plaintiff, and although the plaintiff was willing and desirous all that time to permit and allow her so to do, whereof the said Joanna Wagner and the defendant had notice; by means of which said several premises the plaintiff wholly lost, and was deprived of the services of the said Joanna Wagner, at his said theatre, as such singer and performer during the whole of the said three months, and thereby lost and was deprived of divers great gains and profits, which he might and otherwise would have made and acquired, if she had performed her said contract with him; and was hindered and prevented from deriving the full benefits from divers contracts which he had entered into with one J. M. and T. C., and others, on the faith and belief that the said Joanna Wagner would fulfil her said contract with him; and divers persons were hindered and prevented from making, and refused to make contracts with the plaintiff for being present at the performances at his said theatre during the said three months; and the plaintiff was greatly injured and prejudiced in his character and credit as such proprietor and manager of his said theatre, and the value of his interest therein was greatly depreciated and lessened in value; and the plaintiff was hindered and prevented from bringing out divers operas which he would have brought out, and have had represented, to the great profit and advantage of the plaintiff, if the said Joanna Wagner had performed her said contract with him; and had incurred great expense, part of which he had paid, and the remainder he was liable to pay, in and about making journeys, and taking legal proceedings for the purpose of endeavoring to make the said Joanna Wagner perform her said contract with him, and to restrain and prevent her from breaking the same; to the damage, &c.

*Creasy*¹ now moved for leave to plead, first, not guilty; secondly, a traverse of the contract between the plaintiff and Joanna Wagner being in force at the time when the defendant entered into his agreement with Joanna Wagner, and committed the other grievances alleged, &c.; thirdly, a traverse of the defendant knowing the said contract to be in force, and having notice of the premises, &c.; fourthly, a traverse of its having been in consequence of the alleged acts of the defendant, that Joanna Wagner did not sing and perform for the plaintiff, and likewise to demur to the declaration, on the ground that it did not show any cause of action. The affidavit is made by the defendant and his attorney jointly, that they are advised and believe that the defendant has "just ground to traverse the several mat-

¹ November 12, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

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ters proposed to be traversed," and "that the objection proposed to be raised by demurrer, is a good and valid objection in law." This is in accordance with the 80th section of the 15 & 16 Vict. c. 76, which enacts that "either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party, or his attorney, if required by the court or judge to the effect that he is advised and believes that he has just ground to traverse the several matters, proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid, by way of confession and avoidance, are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law, and it shall be in the discretion of the court or a judge, to direct which issues shall be first disposed of."

[PARKE, B. There is good reason for you to demur; but your client does not pledge his oath that the facts which he proposes to traverse are not true.]

The act of parliament does not require such an affidavit as to traverses, but only as to pleas in confession and avoidance, and similar language is used in the 81st section.

[PARKE, B. We ought not to be satisfied with an affidavit following the words of the statute where the matters are within the personal knowledge of the party pleading.]

POLLOCK, C. B. The privilege given by the statute is only to be allowed where a man shows by his own affidavit that he has merits in fact as well as law.]

Here the facts traversed are more peculiarly within the knowledge of the plaintiff.

[ALDERSON, B. Each case must depend on its own merits. What is the first plea proposed to be pleaded?]

Not guilty.

[PARKE, B. That puts in issue that the defendant induced Joanna Wagner to break her contract. That is a fact within the defendant's own knowledge, and should be sworn to.]

The second plea traverses the contract between the plaintiff and Joanna Wagner being in force at the time of her contract with the defendant.

[PARKE, B. Speaking for myself only, I should say that a statement that he is advised and believes that fact to be true, would probably be sufficient.]

The third plea is a traverse of the defendant's having notice of the contract.

[PARKE, B. That must be within his own knowledge.]

As the fourth plea traverses the averment, that in consequence of the defendant's act Joanna Wagner did not perform her contract with the plaintiff, the defendant cannot do more than swear to his belief as to that point.

[ALDERSON, B. He may inquire of Joanna Wagner, who must know it.]

She is not in England.

[ALDERSON, B. Where a third person is vouched, you should either inquire of that person or show a good reason for not doing so.]

The application for the rule was then withdrawn, and, on the following day,

Creasy renewed the motion. The affidavits have been amended, although it is submitted that the proper construction of the statute is, that an affidavit in the words of the statute is quite sufficient. The affidavit of the defendant, however, now states that the third proposed plea is true in substance and in fact; and as to that and the pleas proposed to be pleaded secondly and fourthly, that when he made and entered into his contract with Joanna Wagner he did not know, nor had he any notice that the contract between her and the plaintiff was in force, but on the contrary it was then represented to him by Joanna Wagner and others, and he then verily believed that it had then been broken and put an end to in consequence of the plaintiff having failed to pay her certain caution money, according to the contract; that Joanna Wagner, in her answer to a bill in chancery, filed by the plaintiff, had stated and sworn of and respecting her contract with the plaintiff in the declaration mentioned and the caution money stipulated for in the said contract, and respecting the reasons why she did not sing for the plaintiff, and respecting the communications between her and the defendant, "that she waited for payment of the caution money until, &c., when she believed that in consequence of the non-payment thereof the contract with the plaintiff was at an end, and that she had been informed by S. and T., singers employed by the plaintiff, and believed that their last season's salaries then still remained unpaid to them by the plaintiff; and she having also then been informed and believed that the plaintiff had then lately been arrested for a large sum of money, and under such circumstances and belief, &c., and no offer having been made to pay the caution money, she, fearing, from the late period of the year, that she should lose all engagements for the season, informed the defendant that she had no longer any contract with the plaintiff, and the defendant having expressed his desire to enter into an engagement with her to act, &c. at the Royal Italian Opera, she concluded an agreement with him;" that Joanna Wagner is now on the continent; that as to the plea of not guilty, the defendant is advised and believes that it is uncertain how many and what statements in the declaration that plea puts in issue, and that he therefore cannot safely swear to the truth of the same, but he swears that he was not guilty of any wrongful, unfair, or dishonest act towards the plaintiff, or any other person, in his dealings and communications with Joanna Wagner; and that he is advised and believes that the plea of not guilty is material and necessary to his defence; also that he is advised and believes that he has a good defence to the action on the merits both as to fact and law; and that he is advised and believes that the pleas proposed to be pleaded are each and all of them necessary to enable him to go fully and completely into his defence on the facts of this case.

Lumley v. Gye.

The court having granted a rule to show cause, the case came on for argument on the 24th of November.

Hoggins (*Bayley* with him) showed cause. The affidavit states that before the present action was brought the plaintiff had obtained an injunction from Parker, V. C., against Joanna Wagner, to prevent her from singing or performing at the defendant's theatre; that the defendant was a party to the proceedings; that all the parties were heard, and the validity of the contract between the plaintiff and Joanna Wagner fully discussed and considered; that that judgment has been appealed against and confirmed by the Lord Chancellor; against that judgment the defendant has not appealed, and thereby shows that he has acquiesced in it. Under these circumstances he ought not to be allowed to raise the same point before another court.

[PLATT, B. Is a party to be bound by the decision of the Court of Chancery as to a fact which is matter for a jury? Besides, he may be entitled to a writ of error.]

The defendant submitted himself to the judgment of the Court of Equity.

[MARTIN, B. How could he help submitting to the Lord Chancellor's judgment? You may, if you please, reply an estoppel.

POLLOCK, C. B. It would make no difference even if he had appealed to the house of lords.

PARKE, B. At present no reason has been given why the defendant should not be allowed both to demur and traverse.]

Hoggins. The defendant ought not to be allowed to plead the particular pleas. He has not sufficiently sworn to the truth of the first and second pleas.

[*Per Curiam*. We think his affidavit sufficient.]

The third plea is bad; it professes to answer the whole and affords an answer to a part only. It amounts to a discontinuance.

[PARKE, B. Then apply to a judge to deal with it. My opinion is quite against you on that point.]

The fourth plea amounts to not guilty, and ought not to be allowed, as being in violation of the 76th section of the statute.

[PARKE, B. I certainly thought the plea of not guilty would be sufficient, but a judge at the trial might perhaps be of a different opinion.]

Creasy (*Willes* with him), for the defendant, in support of the rule. The defendant will give up the fourth traverse if the plaintiff will allow the subject-matter to be given in evidence under the general issue. [This was refused by the other side.] The traverse, then, ought to be allowed, for Joanna Wagner may have refused to sing for the plaintiff, but not in consequence of any act of the defendant.

Per Curiam.¹ As there might arise a question at *Nisi Prius* respect-

¹ POLLOCK, C. B., PARKE, B., PLATT, B., MARTIN, B.

Jackson v. Burnham.

ing the admissibility of the evidence under this plea, we think the plea ought to be allowed.

Rule absolute accordingly.

JACKSON v. BURNHAM, AND ELIZA, his wife, administratrix of B. BEAUMONT.¹

November 25, 1852.

Insolvent — Right to sue after Vesting Order.

An insolvent who has petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110, may sue for a debt which accrues due to him after the vesting order, and before his final discharge, unless the provisional assignee interferes.

[*Herbert v. Sayer*, 5 Q. B. Rep. 965, affirmed.—Eds.]

DEBT against the defendant, and his wife, as administratrix of B. Beaumont, for lodging, attendance, and necessities supplied to the deceased, goods sold, money lent, and on an account stated.

Plea to all, except 5*l.* 6*s.* 10*d.*, that before, &c., the plaintiff petitioned the Insolvent Court for his discharge; that thereupon a vesting order was made, pursuant to the statute 1 & 2 Vict. c. 110, that all real and personal estates and effects of the now plaintiff, both within this realm and abroad, (except the wearing apparel, bedding, and other such necessities of the plaintiff and his family, and the working tools and implements of the plaintiff, not exceeding, in the whole, the value of 20*l.*), also all the future estate, right, title, interest, and trust of the now plaintiff in or to any real or personal estate and effects within this realm, or abroad, which the now plaintiff might purchase, or which might revert, descend, or be devised or bequeathed, or come to him before he should become entitled to his final discharge in pursuance of the said act, according to the adjudication in that behalf, or in case the now plaintiff should obtain his full discharge from custody without any adjudication being made by the said court, then before the now plaintiff should be fully discharged from custody, and all debts due or growing due to the now plaintiff, or to be due to him before such discharge as aforesaid, should be vested in one Samuel Sturgis, then, and being still, the provisional assignee of the estate and effects of insolvent debtors in England. The plea then averred that the said order was duly entered of record and published, and that afterwards, to wit, &c., the plaintiff became entitled to be, and was finally discharged by an order duly made; and that so much of the debt as was pleaded to was contracted and the cause of action accrued due in respect thereof, after the said vest-

¹ 22 Law J. Rep. (N. S.) Exch. 13.

Jackson v. Burnham.

ing order, and before the plaintiff became entitled to his final discharge, and was discharged, and thereupon, by virtue of the said vesting order and of the said 1 & 2 Vict. c. 110, the debt, money, and cause of action pleaded to, and all the right, title, and interest of the plaintiff of and in, and to the same became, and were vested in Samuel Sturgis, as provisional assignee. Verification.

Special demurrer and joinder.

Hawkins, in support of the demurrer.¹ The question raised by this demurrer is, whether an insolvent can sue for a debt accruing due after the vesting order and before his final discharge, the provisional assignee not having interfered. The petition is filed under the provisions of the 35th section of 1 & 2 Vict. c. 110, and declares that the petitioner is willing that all his real and personal estate and effects shall be vested in the provisional assignee for the time being; and the 37th section² vests in the provisional assignee all the insolvent's real and personal estate, and all his future estate, and all debts due or growing due before his discharge. It has been decided that debts accruing due before the insolvent's discharge, vest in the provisional assignee — *Ford v. Dabbs*, 5 Man. & G. 369; s. c. 12 Law J. Rep. (N. S.) C. P. 134; but that does not prevent the insolvent from suing in his own name, if the assignee does not choose to interfere. Under s. 42, the assignee is empowered to sue in his own name, if the court shall so order for recovering any debts; but if the plaintiff cannot maintain his action, the debt would be lost, unless an order were made that the assignee should sue for it. *Herbert v. Sayer*, 5 Q. B. Rep. 965; s. c. 13 Law J. Rep. (N. S.) Q. B. 209, in fact, decides this case. The Exchequer Chamber there held, under 6 Geo. 4, c. 16, s.

¹ November 10, before POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

² Sect. 37, enacts, "That upon the filing of such petition by such prisoner, or on the filing of such petition of such creditor or creditors as aforesaid, and the evidence in support thereof, as the case may be, it shall be lawful for the said Court for the Relief of Insolvent Debtors, and such court is hereby authorized and required, to order that all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person and his family, and the working tools and implements of such prisoner, not exceeding in the whole the value of 20*l.*, and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his final discharge in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his full discharge from custody without any adjudication being made by the said court, then before such prisoner shall be so fully discharged from custody; and all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid, shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, and such order shall be entered of record in the same court, and such notice thereof shall be published as the said court shall direct; and such order when so made shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid in the said provisional assignee," &c.

63 and 127¹ and 1 & 2 Will. 4, c. 56, s. 25,² that a bankrupt who has been twice bankrupt, but whose estate has not paid fifteen shillings in the pound under the second bankruptcy, may acquire and contract for the benefit of his assignees, and sue in respect of such property or contract if the assignees do not interfere.

M. Smith, contra. Herbert v. Sayer is not conclusive as to the construction of the Insolvent Act; and one of the reasons there given, that otherwise there would be no protection to persons dealing with an uncertificated bankrupt, does not apply to an insolvent, since the time between the petition and the discharge is limited. This particular debt vested in the assignee; and the insolvent and the assignee cannot both be entitled to sue for it. What would be the effect of an order that the assignee should sue being made after the action brought or judgment obtained? He referred to *Young v. Rishworth*, 8 Ad. & E. 470; s. c. 7 Law J. Rep. (N. S.) Q. B. 267.

¹ The 6 Geo. 4, c. 16, s. 63, enacted that "the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt wheresoever the same may be found or known, and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

Sect. 127. "That if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any Insolvent Act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children,) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission."

² It enacted "that when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them; and as often as any such assignee shall die or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall by virtue of such appointment vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose."

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Hawkins, in reply. *Young v. Rishworth* was overruled by *Herbert v. Sayer*.

Cur. adv. vult.

The judgment of the court was now delivered by —

POLLOCK, C. B. In this case the declaration was in an action for debt. Plea, that before the action, the plaintiff, being a prisoner, duly petitioned the Insolvent Court, and the court made an order vesting the plaintiff's real and personal estate and effects before his discharge, in Samuel Sturgis, the provisional assignee. The plea then alleged that the debt had accrued after the order, and before the discharge. To this plea there was a special demurrer, assigning for cause that it was not alleged that the provisional assignee had interfered to recover the debt.

The case was argued, before my brothers Alderson, B., Platt, B., and Martin, B., and myself, on the 10th of November last. The question argued before us, which we are now to decide, is substantially whether an insolvent can sue for a debt arising after the vesting order before his final discharge, which his provisional assignee does not interfere to recover. The terms of the 37th section of the 1 & 2 Vict. c. 110, are no doubt very strong and clear. I do not think it necessary now to read the whole of that section. There is no doubt they do very clearly and unequivocally vest in the provisional assignee all the personal estate, both present and accruing due, and hereafter to become due. They establish the right of the provisional assignee as against the insolvent and every other person. But the question is, whether the defendant can set up this defence without any interference or any authority from a third party, namely, the provisional assignee. There has not been any decision upon this point with reference to the Insolvent Debtors Act.

It has been decided that debts accruing before the discharge vest in the provisional assignee, as no doubt they do; but in the case in which that was decided the precise question before us did not arise. There is a recent decision in the Court of Error upon a similar enactment in the bankrupt law, by which we are of opinion that we are bound. The case is *Herbert v. Sayer*. The seventh plea in that case was, that the plaintiff had been twice bankrupt, and had not paid fifteen shillings in the pound under his second bankruptcy, and, therefore, the debt in question belonged to the assignees. To this there was a special demurrer, assigning for cause as in this case, that it did not appear that the assignees had interfered. Upon the argument in the Queen's Bench, that court gave judgment for the defendant on the seventh plea; this judgment was reviewed in the Court of Exchequer Chamber, and, after taking time to consider, that court reversed the judgment of the Court of Queen's Bench, and gave judgment for the plaintiff. The statute upon which the question depended was, the 6 Geo. 4, c. 16, ss. 63 and 127, and in the 63d section it is expressly enacted, not only that the property shall vest in the assignees, but that neither the bankrupt, nor any one claiming under him, shall

have power to recover the debts; yet the court held that the bankrupt had a right to sue except as against his assignees; and as the plea did not allege their interference, it did not contain a complete defence. All the previous cases were adverted to in the judgment, which is binding upon us as the decision of a court of error, and is entitled to great respect as a very elaborate and deliberate judgment.

It is contended that the words in the Insolvent Act are not precisely the same as those of this act. In the first place, we think, the words of the Bankrupt Act are quite as strong, if not stronger, than those of the Insolvent Act, for they actually contain a prohibition against the bankrupt suing for and recovering the money; but even if this were not so, we think it very unadvisable in considering the construction of statutes like these, which relate to similar matters, to draw fine and minute distinctions, rendering it very difficult for suitors to know by what rule such cases are governed. We think, therefore, the same construction ought to be put upon similar provisions in insolvency and in bankruptcy, and in bankruptcy it is *res judicata*. We have given as the foundation of our judgment, the authority of a decision by a superior court, but we would add that the doctrine is by no means new, that the express words of a statute may be controlled and confined to the mischief contemplated by the act. In *Edwards v. Dick*, 4 B. & Ald. 212, it was held, that, although the statute of Anne, c. 14, s. 1, makes "bills of exchange given for money won at play utterly void, frustrate, and of none effect, to all intents and purposes whatever, any law, usage, or custom to the contrary in anywise notwithstanding," an innocent indorsee of such bill might recover against the drawer, the winner of the money, who had procured an acceptance from the loser of the money and had indorsed it to the plaintiff. Mr. Justice Holroyd referred to the cases of ecclesiastical leases under the 13 Eliz. c. 10, s. 3, which, although declared to be utterly void in the same language to all intents and purposes whatsoever, have always been held good as between the parties themselves; the object of the statute being merely to prevent any injury to the succession, not being intended to destroy any obligation on the parties to the instrument themselves. The judgment, therefore, will be for the plaintiff.

I should, however, add that my brother Martin, who heard the case argued along with my brothers Alderson and Platt (and this is the judgment of myself, my brother Alderson, and my brother Platt), entertains some doubt whether, although there be a decision in bankruptcy, we are not bound to take the very express language of another act upon which there has not been actually a positive decision, and administer the law in that way in which we should do if we merely looked at the express language of the statute. Entertaining that doubt, I am not authorized in saying this is also the judgment of my brother Martin; but he did not think it necessary to differ from us by giving a separate judgment, but merely requested me to state that he did entertain those doubts to which I have adverted.

Judgment for the plaintiff.

Roskrugs v. Caddy.

ROSKRUGE V. CADDY AND MAYNE.¹

June 10, 1852.

Replevin — Avowry — Time of Rent Accruing.

Replevin. Avowry "that the plaintiff for a long time, to wit, for all the time during which the rent hereinafter mentioned to be distrained for, was accruing due, and from thence until and at the said time when, &c., held and enjoyed the said close in which, &c., as tenant thereof to the defendant, by virtue of a certain demise thereof theretofore made at and under a certain rent, to wit, the yearly rent of 80*l.*, and because a large sum, to wit, the sum of 80*l.*, of the rent aforesaid, for a certain time, to wit, one year, ending on the 29th of September, A. D. 1851, on the day and year last aforesaid, and from thence until and at the said time when, &c., was due and in arrear" the distress was taken. Plea in bar, *ries in arriere*.

At the trial it was proved, that there was no rent due for the year ending the 29th of September, 1851, but that a portion of the previous year's rent was due:—

Held, that the plaintiff was entitled to the verdict.

REPLEVIN. AVOWRY and cognizance for that the plaintiff for a long time, to wit, for all the time during which the rent hereinafter mentioned, to be distrained for, was accruing due, and from thence until and at the said time when, &c., held and enjoyed the said close in which, &c., with the appurtenances, as tenant thereof to the said J. Caddy, by virtue of a certain demise thereof theretofore made, on and under a certain rent, to wit, the yearly rent of 80*l.*, and because a large sum, to wit, the sum of 80*l.* of the rent aforesaid, for a certain time, to wit, one year, ending on the 29th of September, A. D. 1851, on the day and year last aforesaid, and from thence until and at the said time when, &c., was due and in arrear from the plaintiff to the said J. Caddy, he, the said J. Caddy, well avows, and the said J. Oates Mayne, as bailiff of the said J. Caddy, well acknowledges the taking of the said cattle, corn, goods, and chattels, in the said close, in which, &c., and justly, &c., as, for, and in the name of a distress for the said rent so due and in arrear as aforesaid, and which still remains due and unpaid. Verification and prayer of a return of the distress and damages according to the statute.

Pleas in bar, *non tenuit* and *ries in arriere*, and issue thereon.

At the trial, before Erle, J., at the spring assizes for Cornwall, A. D. 1852, it was proved that on the 24th of September, 1849, the plaintiff and the defendant, J. Caddy, entered into an agreement, not under seal, whereby the plaintiff agreed to take and the defendant to let a certain farm "for the term of seven years, from the 29th day of September instant, paying for the first year at the rate of 80*l.*, the following years to be dependent on the rise or fall of the price of corn." In the course of the first year some payments were made on account of the rent of 80*l.*, but 28*l.* remained unpaid. In August, 1851, the defendant distrained for 88*l.* as rent due up to midsummer

¹ 22 Law J. Rep. (N. S.) Exch. 16.

 Roskrige v. Caddy.

in that year, whereas, in fact, there was no part of the second year's rent due, it being payable yearly. Under this distress beasts of the plough were improperly taken for the rent actually due, and the distress was abandoned as to the residue. Subsequent proceedings were taken in the county court for the illegal distress, the result of which was admitted to be that the 28*l.* so in arrear was still unpaid, and capable of being again distrained for. On the 30th of September, 1851, the defendant distrained again for 80*l.* as rent due for the second year, and this distress was replevied. There was no evidence of the rent having been fixed by reference to the price of corn or otherwise for the second year. Upon these facts, it was objected that the avowry was not proved, as the tenancy set up was a yearly tenancy at the fixed sum of 80*l.* a year, whereas the agreement (although it was void as a lease for seven years, because not under seal) showed that the rent for the second year was to be dependent upon the price of corn. His lordship held that this was the effect of the agreement. It was then contended, on behalf of the defendants, that inasmuch as there was a portion of the first year's rent in arrear, the distress could be supported, and that the amount specified in the avowry and cognizance was immaterial. A verdict was taken for the defendants, with leave to the plaintiff to move to enter the verdict for him, with four guineas damages.

A rule *nisi* had accordingly been obtained on the ground that the distress could not be supported by proof of any rent accrued due prior to Michaelmas, 1851; against which

Collier and Maynard, now showed cause.¹ It being admitted that there was rent due at the time of the distress, the landlord was justified, for there is no question on this record as to the distress being excessive. The tenant knows that some rent is due, and a misstatement of the time when it accrued due is immaterial. The object of the 11 Geo. 2, c. 19, s. 22, was to relieve landlords from the minute particularity required at common law; and an avowry for a greater amount than is due will not prevent the defendant succeeding as to what was due. *Forty v. Imber*, 6 East, 434. Chitty on Pleading, vol. 3, p. 295, 7th edit. was also referred to.

Kinglake, Serg., and *Montague Smith* were not called upon to support the rule.

Per Curiam. We are all of opinion that the rule must be ~~absolute~~ absolute. The rent claimed is not included in the avowry.

Balk, who dissents.

¹ Before POLLOCK, C. B., ALDERSON, B., PLATT, B., and J. C. B. J.

Pinhorn v. Sonster.

PINHORN v. SONSTER.¹

November 17, 1852.

Mortgage — Re-demise — Interest in Premises — Right of distress.

Trespass to goods. Plea, that by an indenture, made in 1847, between Q. and the defendant, it was agreed between Q. and the defendant, who was, during all the time thereafter mentioned, possessed of certain premises for a certain term then to come and unexpired therein, that Q. should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.*, for which rent it should be lawful for the defendant to distrain as landlords may for rents reserved on leases for years; that Q. held the premises under the said indenture and agreement; that three years' and a quarter's arrears of rent became due, during the time Q. held the premises as such tenant, and the defendant was possessed of them as aforesaid; and that the defendant distrained the goods for rent. The plaintiff set out the indenture on oyer, from which it appeared that Q., having become, in 1847, the lessee of the premises, under M. for twenty-one years, wanting one day, and having borrowed money from the defendant, demised the premises to the defendant by way of mortgage, at a peppercorn rent, and that the defendant re-demised the same to Q. at a yearly rent of 150*l.*, with power of distress: —

Held, on demurrer, that the plea was bad in not showing such an interest in the premises, on the part of the defendant, as entitled him to distrain.

TRESPASS for taking the plaintiff's goods.

Plea, that by an indenture of the 29th of July, 1847, made between S. Quested and the defendant, it was agreed between S. Quested and the defendant, who then became, and during all the time hereinafter mentioned was possessed of the premises hereinafter mentioned, for a certain term then to come and unexpired therein, that S. Quested should hold the said premises in the indenture mentioned as tenant at will to the defendant, at the yearly rent of 150*l.*, payable at Lady Day, &c.; for which rent it should be lawful for the defendant to distrain as landlords may for rents reserved on leases for years; but that it should be lawful for the defendant at any time to determine such tenancy by a written notice. That S. Quested held the premises as tenant to the defendant under the indenture and agreement. That on the 25th of December, 1851, 48*l.* 10*s.* of the rent for three years and a quarter, ending on the said 25th of December, during all which time Quested held the premises under the indenture as such tenant, and during all which time the defendant was possessed of the said premises as aforesaid, became due from Quested to the defendant. Whereupon the defendant distrained the goods and chattels in the declaration mentioned, the same then being upon the said premises.

The plaintiff set out the indenture on oyer, being a mortgage-deed. It recited that the premises in question were demised by one Muggeridge to S. Quested for twenty-one years, wanting one day, subject to certain conditions and covenants; that Quested had applied to the defendant to lend him 400*l.*, which the defendant had consented to do on the same being secured as thereafter mentioned. The indenture then witnessed that Quested demised the premises in question for all the residue of the term of twenty-one years, wanting one day, to

¹ 22 Law J. Rep. (N. S.) Exch. 18.

the defendant, at a peppercorn rent, with the usual proviso for redemption on payment of principal and interest. It was then further agreed that Quedsted should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.*, for which rent the defendant might distrain on the premises, as landlords might for rent reserved on leases for years. There was then a proviso for reëntry in case of default in payment of the principal and interest, or of the yearly rent. The plaintiff then demurred specially,¹ assigning for causes thereof, that the plea did not allege with sufficient certainty what estate or interest the defendant had in the premises at the time Quedsted agreed to hold them as tenant at will to the defendant; and that the allegation that the defendant was lawfully possessed of the same for a certain term was too general and uncertain; and that the indenture did not operate as such a demise of the premises as would entitle the defendant to distrain the goods of third parties for rent.

T. Jones, for the plaintiff, appeared in support of the demurrer; and

Macnamara, for the defendant. The defendant was entitled under the deed to distrain.

[*PARKE, B.* The plea does not aver such an interest in the defendant as entitled him to distrain. The deed ought to have averred that the defendant had an estate in fee. The plea is defective on general demurrer.]

The averment of possession is sufficient.

[*PARKE, B.* If the plaintiff's goods had been trespassing on the defendant's close, the latter might have taken them damage feasant, and have removed them to some convenient place; but he cannot do any thing else. He ought to have alleged a sesin in fee, and have stated his title, and then if the fee had not been traversed, he would have succeeded; but in the present case there is nothing but a title by estoppel, and the plaintiff does not claim either through the defendant or Quedsted. The defendant had no right to distrain for the rent. In *Walker v. Giles*, 6 Com. B. Rep. 663; s. c. 18 Law J. Rep. (N. S.) C. P. 323, certain shareholders in a building society, by way of security for the payment of their contributions, conveyed premises to trustees, who were to permit the shareholders to receive the rents until default in payment of the contributions, with power to the trustees in case of default to receive the rents and to sell the premises. The shareholders also agreed to become tenants to the trustees of the premises "henceforth" at will, at a yearly rent. It was held that this indenture did not operate as a demise, so as to sustain an avowry, alleging a tenancy under the trustees at a yearly rent; the general scope of the deed being inconsistent with such a construction.]

*Per Curiam.*² The plea is certainly bad. There must be

Judgment for the plaintiff.

¹ The point as to the effect of the Common Law Procedure Act on pending special demurrers is reported 21 Law J. Rep. (N. S.) Exch. 336; s. c. *ante*, p. 415.

² *POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.*

 Regina v. Hodgson.

REGINA v. HODGSON.¹

JUNE 8, 1852.

Removal of Indictment by Certiorari — 5 & 6 Will. & M. c. 11, ss. 2, 3 — Recognizance, Form of — Sureties, Liability of, to Costs.

Upon removal of an indictment by *certiorari* from the Sessions to the Queen's Bench, the sureties in the recognizance become bound as sureties for the payment of the costs in the event of a verdict being found for the crown, although there are no words to that effect in the conditions to the recognizance; the 3d section of the 5 & 6 Will. & M. c. 11, being, in effect, incorporated with the recognizance.

The recognizance was stated to have been entered into before "J. T., Esq., one of the justices for the county of," &c.: —

Held, good.

THIS was a demurrer to a replication to a plea to an estreat. The estreat directed the sheriff of Westmoreland to inquire as to the lands and tenements, and the yearly value of the same of certain persons mentioned in the schedule to the said estreat. Among the list of persons mentioned in the schedule, appeared the name of Miles Hodgson, as follows: — "Michaelmas term, 13 Vict 1849. Of Miles Hodgson, of Kirkby Lonsdale, in the county of Westmoreland, shoemaker, one of the sureties of John Thornton, because he did not pay to the prosecutor his costs, taxed according to the course of the said court, upon an indictment for certain misdemeanors whereof he was convicted as by the course and practice of the said court he ought to have done, but made default. Forty pounds."

To this the sheriff had made a return in which he certified that he had been served with a copy of an order made by Talfourd, J., by which the said Miles Hodgson should have till the 8th day of the then next term to appear and plead to the said estreat.

The plea cravedoyer of the roll of estreat, and the said extract of recognizances, whereby it appeared that one John Thornton was indebted to the crown, in 80*l.*, Henry Robinson in 40*l.*, and the said Miles Hodgson in 40*l.*, John Thornton for not paying the costs of the prosecution upon a certain indictment upon which he had been convicted, and the said Henry Robinson, and Miles Hodgson, as his sureties. The defendant, then, protesting against the validity of the estreat, for plea nevertheless, and for discharge of the recognizance pleaded, setting out the recognizance by which he acknowledged that John Thornton owed to the crown 80*l.*, the said Henry Robinson 40*l.*, and the defendant 40*l.*, the conditions of the recognizances being, that if he the said "John Thornton, shall appear in the Queen's Bench at Westminster, on the 22d day of May, instant, in next Trinity term, and shall plead to all and singular indictments of whatever misdemeanors whereof he stands indicted, and at his own proper costs and charges

¹ 21 Law J. Rep. (N. S.) M. C. 181.

shall cause and procure the issue or issues that may be joined thereon to be tried in the same term, or at the next assizes to be holden after the same term, in and for the county of Westmoreland, if the said court shall not appoint any other time for the trial thereof, and if the said court shall appoint any other time for the trial thereof, then at such other time, and shall give due notice of such trial to the prosecutor or his attorney, and shall appear, from day to day, in the said court, and not depart until discharged by the said court, then this recognizance to be void or else to remain in full force." The recognizance was stated to have been entered into before "John Tatham, Esq., one of the justices of the peace for the county of," &c., not saying "in and for." The defendant then averred that previously to entering into the said recognizance, a bill of indictment had been presented to the Quarter Sessions for the county of Westmoreland, against the said John Thornton, for not having paid certain costs which had been awarded against him by the Court of Quarter Sessions, upon the trial of an appeal against a certain certificate of two justices. The certificate was for stopping up and diverting a portion of the public footway in the town of Kirkby Lonsdale. The plea then averred that the said John Thornton stood indicted with no other indictment, and that the said indictment was by a writ of *certiorari* removed into the Court of Queen's Bench; that the said John Thornton appeared to the said indictment and pleaded not guilty thereto, and issue was joined thereupon. And the defendant then averred, that the said John Thornton, to wit, on the 6th day of August, at Appleby, in the county of Westmoreland, at his own proper costs and charges, did cause and procure the said issue so joined as aforesaid to be tried in the due course of law, at the assizes then and there holden in and for the said county of Westmoreland, being the assizes next after the same term in and for the said county; and the defendant averred, that the Court of Queen's Bench did not appoint any other time for the trial of the said other issue, and that the said issue was the only issue ever joined in the said indictment. The defendant further averred that upon the trial the said John Thornton was found guilty of the charge laid against him in the indictment, and that previously to the said trial he did give notice thereof to the prosecutors, and that he did appear from day to day in the Queen's Bench, and did not depart therefrom until he was committed to prison as thereafter is mentioned; that he was adjudged by the Queen's Bench to two months' imprisonment; that he remained in prison two months, and then was discharged by the Queen's Bench without a day being given to him to appear, and that no other judgment was ever given against him.

To this plea the Attorney-General replied, that at the time of the granting the writ of *certiorari*, the Court of Queen's Bench ordered that the said John Thornton should enter into a recognizance in 80*l.*, with two manucaptors or sureties in 40*l.* each, according to the statute; that the said John Thornton and Henry Robinson and Miles Hodgson as the manucaptors or sureties of the said John Thornton, did enter into the said recognizance mentioned in the said estreat; that after the conviction of John Thornton the Court of Queen's

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Bench gave to the prosecutors of the said indictment their costs, which amounted to 79l. 2s.; that the *allocatur* of the coroner for that amount was served upon John Thornton and the amount demanded of him; that the said John Thornton refused to pay; that the said *allocatur* was afterwards served upon Henry Robinson and the defendant, and the amount demanded of them. That afterwards an attachment was issued against John Thornton for contempt in non-payment of the said amount; that he was attached, and that at the time of the said attachment and of the said estreat the sum of 79l. 2s. remained unpaid.

Demurrer.

Pashley (*Henniker* with him), in support of the demurrer. First, the condition of the recognizance has been fully complied with. The defendant does not say that the recognizance ought to be discharged, but he insists that he has performed all that he bound himself, by the words of the condition of the recognizance to do. If he had intended to bind himself, or if the crown had intended that he should be bound to pay the costs, or see them paid, it ought to have been so expressed. And, although the words of the 5 & 6 Will. & M. c. 11, s. 3,¹ are "And that the said recognizance shall not be

¹ The 5 & 6 Will. & M. c. 11, s. 2, enacts as follows: "That in term time no writ of *certiorari* whatsoever, at the prosecution of any party indicted, be hereafter granted, awarded or directed out of the said Court of King's Bench to remove any such indictment, or presentment of trespass or misdemeanor before trial had from before the said Justices in the said Courts of General or Quarter Sessions of the Peace, unless such *certiorari* shall be granted or awarded upon motion of counsel and by rule of court made for the granting thereof, before the judge or judges of the said Court of King's Bench, sitting in open court. And that all the parties indicted prosecuting such *certiorari* before the allowance thereof shall find two sufficient manucaptors, who shall enter into a recognizance before one or more justices of the peace of the county or place, in the sum of 20l., with conditions at the return of such writ to appear and plead to the said indictment or presentment in the said Court of King's Bench, and at his and their own costs and charges to cause and procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereto, to be tried at the next assizes to be held for the county wherein the said indictment or presentment was found after such *certiorari* shall be returnable if not in the cities of London, Westminster, or county of Middlesex; and if in the said cities or county, then to cause or procure it to be tried the next term after wherein such *certiorari* shall be granted, or at the sitting after the said term, if the Court of King's Bench shall not appoint any other time for the trial thereof, and if any other time shall be appointed by the court then at such other time, and to give due notice of such trial to the prosecutor or his clerk in court, and that the said recognizance and recognizances taken as aforesaid shall be certified into the said Court of King's Bench, with the said *certiorari* and indictment to be there filed, and the name of the prosecutor (if he be the party grieved or injured) or some public officer to be indorsed on the back of the said indictment, and if the person prosecuting such *certiorari*, being the defendant, shall not before allowance thereof procure such manucaptors to be bound in a recognizance as aforesaid, the justices of the peace may and shall proceed to trial of the said indictment at the said sessions, notwithstanding such writ of *certiorari* so delivered."

Section 3. And be it further enacted, "That if the defendant prosecuting such writ of *certiorari* be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough,

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discharged till the costs so taxed be paid;" yet no one can be bound beyond the terms of the contract into which he enters, and here there is a distinct contract between the crown and the subject. Secondly, the recognizance is void, it having been entered into before a justice who had no jurisdiction. The words are "before John Tatham, Esq., one of the justices, for," &c., not saying "in and for." *The Queen v. Stockton*, 7 Q. B. Rep. 520; s. c. 14 Law J. Rep. (N. S.) M. C. 128, and *The Queen v. Lynch*, 7 Irish Equity Rep. 263, are in point.

[MARTIN, B. You should have set it out and have shown that it was void.]

It appears upon the face of it. Magistrates can only act within certain limits, and it must appear whenever an act of parliament authorizes magistrates to perform any act that the magistrate has acted within his jurisdiction. *Taylor v. Clemson*, 11 Cl. & F. 610, *Day v. King*, 5 Ad. & E. 359; s. c. 5 Law J. Rep. (N. S.) M. C. 130, and *The Queen v. Toke*, 8 Ibid. 227; s. c. 7 Law J. Rep. (N. S.) M. C. 74.

The Attorney-General, F. Thesiger, (*Atherton* with him), for the crown. This is virtually an application to discharge the recognizance. The form and condition of the recognizance are given by section 2 of the 5 & 6 Will. & M. c. 11, and by the act a condition has been incorporated in the recognizance. Besides which the point is now settled by the decisions. *The King v. Finmore*, 8 Term Rep. 409; *The King v. Teal*, 13 East, 4; *The Queen v. Byzant*, 7 Dowl. P. C. 680.

[PLATT, B. Look to the prayer of the plea. The defendant prays to be discharged from the recognizance.]

(He was then stopped.)

POLLOCK, C. B. The crown is entitled to judgment. All the precedents as well as the practice are against the argument in support of the demurrer, on the second point, and the list of cases cited by the Attorney-General is conclusive upon the first point. In truth no distinction can be taken between an application to discharge the recognizance and the present case.

ALDERSON, B. There has been a long line of decisions which shows that the 3d section of the act of parliament has been incorporated into the 2d section, and, therefore, that the recognizance remains

tythingman, churchwarden or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done, that concerned him or them as officer or officers to prosecute or present, which costs shall be taxed according to the course of the said court; and that the prosecutor for the recovery of such costs shall, within ten days after demand made of the defendant, and refusal of payment, on oath have an attachment granted against the defendant by the said court for such his contempt; and that the said recognizance shall not be discharged till the costs so taxed shall be paid."

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until the costs are paid. On the second point, the causes cited, if rightly understood, are authorities against the demurrer.

PLATT, B. I am of the same opinion. The recognizance cannot be discharged until the costs are paid. The 3d section would not, in terms, meet the conditions of the recognizance, but must be considered as incorporated with it.

MARTIN, B. This is a question of contract between the crown and the defendant, and if it had not been for the cases cited by the Attorney-General, I should have arrived at a different conclusion from the rest of the court, but it seems that we are entirely bound by authority.

Judgment for the crown.

SHAW v. THE BANK OF ENGLAND.¹

November 10, 1852.

Patent — Inspection of Machine — 15 & 16 Vict. c. 83, s. 42.

In an action for the infringement of a patent, the court will not grant an order, under the 15 & 16 Vict. c. 83, s. 42, for an inspection of a machine upon an affidavit "that the machine used by the defendants is the same for which the plaintiff has obtained a patent."

HAWKINS moved, under the 15 & 16 Vict. c. 83, s. 42, for a rule calling upon the defendants to show cause why certain persons, named in the affidavits, should not be allowed to inspect the machine used by the defendants for numbering and paging books. An action is pending for the alleged infringement of a patent belonging to the plaintiff for numbering and paging books; and it is sworn in the affidavit "that the machine used by the defendants for paging and numbering their books, is the same for which the plaintiff has obtained a patent."

[MARTIN, B. You mean to say that the word "inspection" in this clause applies to every inspection that the court thinks it necessary that the party applying should have.

POLLOCK, C. B. This is a power only hitherto exercised by the Court of Chancery; and now that the legislature has given to the common law courts the power of granting injunctions, it must be presumed that those powers are to be exercised in the same way as they have hitherto been by the Court of Chancery. Cases have occurred in chancery when such an injunction as here asked for has been granted.

ALDERSON, B. The application is, in fact, to get evidence of the

¹ 21 Law J. Rep. (N. S.) Exch. 26.

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infringement. You say to the defendant, produce the machine you use; he does so, and it is an admission that it is used by him.]

The 42d section gives the court power to make this order. It enacts that, "in any action in any of her Majesty's superior courts of record at Westminster and in Dublin, for the infringement of letters patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting, then for a judge of such court, on the application of the plaintiff or the defendant, respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account and the proceedings therein respectively, as to such court or judge may seem fit."

POLLOCK, C. B. The affidavit is too vague and defective for the court to grant this application. It ought, at least, to state that there is such a machine, and that the plaintiff has reason to believe it is an infringement.

ALDERSON B., PLATT, B., and MARTIN, B., concurred.

*Rule refused.*¹

GLEN v. LEWIS.²

November 4, 1852.

Practice — Rule to plead several Matters — Time to plead.

An order to plead several matters was obtained, after the rule office was closed, upon the day that the time for pleading expired. The pleas were delivered the same evening, with a copy of the order and a notice that the rule would be drawn up and served as soon as it could be obtained from the office. At 10 o'clock the following day the plaintiff signed judgment:—

Held, that the judgment was regular.

KARSLAKE moved for a rule, calling upon the plaintiff to show cause why the interlocutory judgment signed herein should not be set aside for irregularity, and why the rule to plead several matters should not stand, and why the pleas authorized to be pleaded should not be re-delivered without any further summons, or order, or rule to plead several matters.

The declaration was delivered on the 22d of July, and a summons for leave to plead several matters was taken out on the 30th of July

¹ The rule *nisi* was subsequently obtained on amended affidavits; but was discharged upon a collateral ground, so that no decision was necessary as to the power to order such an inspection.

² 22 Law J. Rep. (N. S.) Exch. 24; 16 Jur. 1121.

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and attended by both parties on the 31st, when the order was made at 20 minutes past three. It was then too late to get the rule drawn up; but as the time for pleading expired on that day, the pleas were delivered with a copy of the order and a notice that the rule would be drawn up and served as soon as it could be obtained from the rule office. At 11 o'clock on Monday, and before the rule could be obtained, the plaintiff signed judgment as for want of a plea. This judgment was irregular, as the defendant did all he could, and followed the course suggested in 1 Chitty's Arch. 260, for which *Maynard v. Bright*, 3 B. & B. 256, and Tidd's Practice, p. 557, are cited as authorities.

[ALDERSON, B. It is a common practice to ask for the time for pleading to be enlarged that the rule may be obtained. The judgment was quite regular. Have you an affidavit of merits?]

POLLOCK, C. B., referred to *Wilkes v. Otley*, 2 Nev. & P. 99.]

An affidavit of merits being produced, the rule was granted, and afterwards made absolute, the defendant paying all costs; but on the point of irregularity,

Rule refused.

YOUNG and others, assignees of NORMINGTON, v. WAUD.¹

November 16, 1852.

Bankrupt — Act of Bankruptcy — Mortgage of Machinery.

Where a trader assigns part of his property, by way of mortgage, the question under the bankrupt laws is not whether putting the deed in force will put an end to his business, but whether it will make him insolvent.

A manufacturer assigned all his machinery, by way of mortgage, to secure the amount of certain bills drawn by him and accepted by the consignees of his goods, which had been discounted by the mortgagee, and also of such other bills as should from time to time be discounted in like manner. The mortgagee was empowered, after three days' notice to enter and take possession of all the machinery, and, after a sale of the same, to pay the amount of the expenses and the bills then due or running, and to pay the surplus to the mortgagors. At the time of the execution of this deed, the machinery was worth 1,500*l.*, and the mortgagor's property consisted of goods, 1,100*l.*, and good debts, 900*l.*, while his whole liabilities were, 2,900*l.*: —

Held, that this deed was no evidence of an act of bankruptcy, although, had it been acted upon, the mortgagor could not have carried on the particular business in which he was engaged.

TROVER by the plaintiffs, as assignees of I. Normington, for goods and chattels, power looms and machinery.

Pleas. Not guilty and not possessed. Issues thereon.

At the trial, at the York spring assizes, 1852, before Lord Campbell, C. J., it appeared that I. Normington, the bankrupt, was a worsted-

¹ 22 Law J. Rep. (N. S.) Exch. 27.

spinner and stuff-manufacturer at Bradford, in Yorkshire, and L. Normington, his father, although made a party to the deed hereinafter mentioned, was not in fact in partnership with him. The goods were usually consigned to Messrs. Brooks & Son, of Manchester, who accepted bills drawn upon them by I. Normington, which were discounted by the defendant, at the rate of 20 $\frac{1}{2}$ per cent. Towards the end of June, 1851, the defendant not being satisfied with the security afforded by the names on the bills which he had discounted, required further security, and on the 2d of July the following deed was executed:—“ This indenture, made the 2d of July, A. D. 1851, between L. Normington, of Bradford, and I. Normington, of the same place, carrying on business there as worsted-spinners and manufacturers, and trading under the name, style or firm of ‘ L. Normington ’ of the one part, and W. Waud, of Bradford, aforesaid. Whereas the said W. Waud is in the habit from week to week of discounting for the said L. Normington and I. Normington, to enable them to carry on their business, certain bills of exchange at different dates, chiefly drawn by the said I. Normington upon and accepted by Messrs. W. Brooks & Son, of Manchester, and indorsed by the said L. Normington and I. Normington to the said W. Waud, and certain other bills of exchange received or drawn by them in their trade; and whereas the said W. Waud, not being satisfied with the solvency of the party or parties whose name or names appear upon such bill or bills of exchange as the said L. Normington and I. Normington, from time to time presented to him for the purpose of being discounted, has refused to further discount for them any such bill or bills as before mentioned, unless the said L. Normington and I. Normington, in addition to such bill or bills of exchange, should give to the said W. Waud the security hereinafter mentioned, but such security not to exceed the amount or sum hereinafter named, which the said L. Normington and I. Normington have consented and agreed to do. And whereas it has been agreed, by and between the said L. Normington and I. Normington and W. Waud that this security shall extend to and be available to the said W. Waud, his executors, administrators and assigns, for such sum or sums of money as he shall, from time to time, pay to the said L. Normington and I. Normington, upon the discounting of any bill or bills of exchange (not exceeding the amount hereinafter named), notwithstanding any of the said bill or bills of exchange shall not have come to maturity or have been dishonored; it being the intention of the said parties hereto, that the said W. Waud shall be at liberty, at any time or times hereafter, so long as any bill or bills of exchange received by him from the said L. Normington and I. Normington shall be owing, and still to become due, to enter into and upon and take possession of the frames, looms, machinery, and effects hereby assigned, and hold and enjoy the same as is hereinafter expressed. Now, this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the premises, and in consideration of 10s. to them paid, &c., they, the said L. Normington and I. Normington, do, and each of them doth by these presents, assign and

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transfer unto the said W. Waud, and his executors, administrators and assigns, all those fifteen spinning-frames, with the gearing, machinery, and effects connected therewith and belonging thereto, in and upon the Junction Mill, now used and occupied by the said L. Normington and I. Normington, and used and employed by them in their trade or business of manufacturers; and also those 133 worsted power looms, with the gearing, machinery, and effects connected therewith and belonging thereto, in and upon the said Junction Mill aforesaid, now used and occupied by the said L. Normington and I. Normington, and used and employed by them in their trade or business of manufacturers; and all other spinning-frames, looms, machinery, chattels, and effects now erected or erecting or hereafter to be erected, fixed, or set up, or which may belong to the said L. Normington and I. Normington, in and about the said mill as aforesaid; and all the estate, right, title, and interest, both legal and equitable, of them the said L. Normington and I. Normington; to have, hold, receive, take and enjoy the said spinning-frames, looms, machinery and effects hereby assigned, or intended so to be, unto the said W. Waud, his executors, administrators and assigns, as and for his and their own proper goods, chattels and effects, absolutely and forever, upon the trusts hereinafter declared concerning the same, namely, upon trust for securing the payment of any sum or sums of money (not exceeding in the whole the principal sum hereinafter mentioned), in which the said L. Normington and I. Normington may, at any time, or from time to time hereafter be indebted to the said W. Waud, his executors or administrators, for, or on account of, any bill or bills of exchange made, drawn, paid, indorsed, or accepted by the said L. Normington and I. Normington, or any other person or persons whomsoever, and discounted by the said W. Waud, for and to the use and benefit of the said L. Normington and I. Normington, or on any other account whatsoever, clear of all deductions whatsoever, and for that purpose, in case default shall be made in payment of the whole or any part of such sum or sums of money, within three days after the same shall have been demanded, then upon trust at any time or times thereafter, so long as any of the said sum or sums, or any part thereof, shall remain unpaid, without the necessity of any further consent or concurrence on the part of the said L. Normington and I. Normington, their executors, administrators or assigns, to take possession of the said frames, looms, machinery, chattels and effects, and thenceforth to hold and enjoy the same to and for his and their absolute use and benefit; and also at his and their discretion to make sale and absolutely dispose of the same chattels and effects by public auction or private contract, either together or in parcels, with liberty to buy in and re-sell the same, without being responsible for any loss that may be incurred thereby, and to give receipts for the purchase-money, which shall effectually exonerate the persons paying the same from all responsibility with respect to the application thereof, or from inquiring into the necessity or expediency of any such sale or sales, or whether any such default as aforesaid, shall have been made; and upon further trust that in

case any such sale or sales shall be made by the said W. Waud, the said W. Waud, his executors, administrators or assigns, shall stand possessed of the purchase-moneys, upon trust, in the first place, to retain or pay and satisfy all costs, charges and expenses incident to such sale or sales and to the execution of these presents; and in the next place, to retain or pay and satisfy unto the said W. Waud, his executors, administrators or assigns, the sum or sums (not exceeding the amount hereinafter mentioned) in which the said L. Normington and I. Normington, their executors or administrators, shall be indebted to him or them on the balance of or for account of any bill or bills of exchange made, drawn, paid, indorsed and accepted by the said L. Normington and I. Normington, and discounted by the said W. Waud, or any other bill or bills of exchange discounted for the said L. Normington and I. Normington by the said W. Waud, and all costs, charges and expenses sustained or incurred in or about any suit or suits at law or in equity, which shall be instituted for enforcing the payment of any such sum or sums of money or any part thereof; and then, upon trust, to pay over the surplus (if any) unto the said L. Normington and I. Normington, their executors, administrators or assigns, for their own use and benefit; provided always, and it is hereby further declared, that the total amount of principal moneys to be ultimately recoverable under or by virtue of the security hereby made shall not exceed the sum of 2,000*l.*, and that such security shall not be considered as wholly or partially satisfied by the payment or liquidation, otherwise than by putting in force the same security, of any sum or sums of money which shall, at any time or times, or from time to time, be due and owing from the said L. Normington and I. Normington, trading as aforesaid, on such accounts as aforesaid, or as wholly satisfied by the payment or liquidation by means of such security of the entire balance which shall at any time be so due and owing, unless the same, either alone or together with any sum or sums previously paid or liquidated, shall, in like manner, be equal to the total amount aforesaid, but the said security shall extend to cover any sum or sums of money which shall, for the time being, constitute the balance due from the said L. Normington and I. Normington trading as aforesaid, until principal moneys to the full amount aforesaid shall have been actually recovered or satisfied by means of the security herein contained: Provided also, and it is hereby further declared and agreed, by and between the said parties hereto, that the said W. Waud, his executors, administrators or assigns, shall and will, upon receiving seven days' previous notice in writing from the said L. Normington and I. Normington, their executors, administrators or assigns, for that purpose, declare to the said L. Normington and I. Normington, or either of them, or their executors, administrators or assigns, an account in writing of all and every the bills of exchange or other bills which may have been discounted by the said W. Waud, his executors or administrators, for them as aforesaid.

And the said L. Normington and I. Normington, do hereby, for themselves severally and respectively, and for their several and respect-

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ive heirs, executors and administrators, covenant and agree with the said W. Waud, his executors, administrators and assigns, that the said L. Normington and I. Normington, or one of them, their or one of their heirs, executors or administrators, shall and will pay or cause to be paid unto the said W. Waud, his executors, administrators or assigns, such sum or sums of money (not exceeding the principal sum aforesaid) as may at any time, or from time to time, hereafter, be due and owing from the said L. Normington and I. Normington, to the said W. Waud, his executors, administrators or assigns, at the time or times, and in the manner hereinbefore expressed for payment of the same, according to the true intent and meaning of these presents. And the said W. Waud doth hereby, for himself, his heirs, executors and administrators, covenant with the said L. Normington and I. Normington, their executors, administrators or assigns, that he or they, the said W. Waud, his heirs, executors or administrators, will not take possession of, or proceed to a sale of the said frames, looms, machinery, chattels and effects hereby assigned under the trust hereinbefore contained until default shall have been made by the said L. Normington and I. Normington, or one of them, their or one of their heirs, executors or administrators, in payment of the moneys hereby secured or intended so to be, or some part thereof, as is hereinbefore mentioned or provided in and by the same trust for sale, but so, nevertheless, that this present covenant shall not affect any purchaser or purchasers under the said trust for sale, nor any person or persons claiming under such purchaser or purchasers. In witness whereof," &c.

At the date of this indenture being made there were four bills of exchange running, of 100*l.* each, which had been drawn by the bankrupt, I. Normington, upon and accepted by Messrs. Brooks & Son, of Manchester, and which had been discounted by the defendant for the bankrupt at 20*l.*, per cent.; and the value of the bankrupt's property was, machinery 1,500*l.*, goods 1,100*l.*, debts due to him 900*l.*, while his liabilities were 2,900*l.* Between the date of the deed and the November following, bills were, from time to time, drawn, accepted, and discounted as above mentioned, and those which came to maturity were regularly paid; but in that month Messrs. Brooks & Son failed, and the bills which then became due were dishonored. On the 2d of December, the defendant had in his hands dishonored acceptances to the amount of 291*l.* 10*s.*, and five others amounting to 500*l.* which he had discounted, but which were not then due. On the 2d of December, the defendant took possession of the machinery under the deed, and on the 5th of December a petition was filed, on which I. Normington was adjudged a bankrupt. The bankrupt, who was called on behalf of his assignees, proved that he had no intent to prefer the defendant to the injury of the other creditors, and that the cause of his bankruptcy was the failure of Messrs. Brooks & Son at Manchester, and that but for that circumstance he should have been perfectly solvent. His lordship left the case to the jury, telling them that the deed would amount to an act of bankruptcy if they thought that the bankrupt would have been unable to continue

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to carry on his business had it been acted upon. The jury found a verdict for the plaintiffs for 756*l.* 17*s.* 9*d.*, and leave was reserved to the defendant to move to enter the verdict for him if the court should be of opinion that there was no evidence to go to the jury of an act of bankruptcy.

A rule *nisi* was accordingly obtained in Michaelmas term, against which,

Hugh Hill, Hall and West now showed cause. The jury were justified in finding this verdict, for all the circumstances of the case showed that bankruptcy would have been the inevitable result if the deed had been acted upon. The deed was secret, and the defendant himself admits by the recital that the solvency of the bankrupt at the time of the assignment was doubtful. There was no provision binding the defendant to advance a shilling, and yet he could enter and take possession of the whole property. The deed was, within the meaning of the Bankrupt Act, a fraudulent transfer with intent to defeat and delay creditors, because the defendant would thereby obtain a preference, having the power to deprive the other creditors of the property comprised in the assignment. The subject of deeds of this kind has recently been under the consideration of the Court of Common Pleas, in *Graham v. Chapman*, 21 Law J. Rep. (N. S.) C. P. 173; s. c. 11 Eng. Rep. 498, where all the previous authorities are collected. It was there held, that an assignment of a trader's property, without fraud in fact, and for a new advance, is an act of bankruptcy if it includes the sum advanced, and professes to give the assignee a right to take the trader's future acquired property upon non-payment of the debt within a certain time. *Siebert v. Spooner*, 1 Mee. & W. 714; *Lindon v. Sharpe*, 6 Man. & G. 895; *Whitwell v. Thompson*, 1 Esp. 68, are there commented upon, and much doubt is thrown upon the doctrine that an assignment for future advances is valid. Here there is the power to enter and seize the machinery, so that the necessary consequence would be a stoppage of the business.

[PARKE, B. The bankruptcy statutes refer to inability to carry on trade by reason of insolvency.]

The solvency of the bankrupt was involved in the question left to the jury, and must have been so understood by them. The bankrupt could not have carried on trade at all after the deed was put in force.

[PARKE, B. The bankrupt had more than half his property left.]

The statement of the bankrupt included the supposed value of debts due to him, and the jury would not be inclined to adopt that statement as correct. *Wedge v. Newlyn*, 4 B. & Ad. 831; *Porter v. Walker*, 1 Man. & G. 686; s. c. 9 Law J. Rep. (N. S.) C. P. 334; *Carr v. Burdiss*, 1 Cr. M. & R. 443; s. c. 4 Law J. Rep. (N. S.) Exch. 60; and *Bowker v. Burdekin*, 11 Mee. & W. 128; s. c. 12 Law J. Rep. (N. S.) Exch. 329, were also referred to.

Watson, Tomlinson, and Hamerton, in support of the rule. When the facts of the case are looked at, it will be seen that the deed was

Young v. Waud.

not an act of bankruptcy. It was made at a time when the bankrupt was solvent, and did not comprise all his property. He had, in fact, as much again in value as that which was mortgaged, and as no evidence was offered by the assignees to impeach his statement, the jury were justified in believing it. The proceeds of the deed, if acted upon, were to be applied in payment of the bills due, and then in trust for the bankrupt himself. There was no intent to delay the creditors in general; and although his business as a manufacturer with that particular machinery might have been stopped by possession being taken under the deed, he might have paid all his debts and recommenced that or any other business. There are two distinct classes of assignments which are acts of bankruptcy; the first, where insolvency is the inevitable result independently of any particular intention, as where the whole of the trader's property is assigned, or the whole with a colorable exception of a small part; and the second, where there is the intent to prefer a particular creditor, or to delay or defeat the creditors in general. This deed falls within neither class. *Graham v. Chapman* does not apply, for the whole of the trader's property was there assigned. A bill of sale, although it delays creditors, is not an act of bankruptcy if the trader is solvent. *Gibbins v. Phillipps*, 7 B. & C. 529; s. c. 6 Law J. Rep. K. B. 98.

POLLOCK, C. B. The question before us is, whether the verdict for the plaintiffs is to be set aside, and a verdict entered for the defendant instead. On reference to the note of the lord chief justice, I find that "the verdict was entered for the plaintiffs, with liberty reserved to the defendant to enter it for him, if the court should think that there was no evidence to go to the jury of an act of bankruptcy." If at the trial the learned judge had thought there was no evidence, he would have directed the plaintiffs to be nonsuited, but the plaintiffs got the verdict, and I think they ought not to be in a worse position than if at the trial Lord Campbell had decided against them. The verdict seems to have passed upon the question, whether, if the deed had been put in force, it would have prevented the business from going on. We think that mode of putting the question was not correct in point of law. The incapacity to carry on business, which makes an act of bankruptcy, must not be in consequence of the removal of machinery, but by the abstraction of so much of the trader's effects as to render him incapable of going on by reason of insolvency. I think there was no evidence of any act of bankruptcy, but, for the reason before given, that the rule should be made absolute for a nonsuit.

PARKE, B. I am of the same opinion. The simple point for us to decide upon is, whether this is an act of bankruptcy. There is no case deciding that an assignment of this kind, not being a fraudulent transfer in contemplation of bankruptcy, of less than half the trader's property, although an assignment of his instruments of trade, is an act of bankruptcy. The question is not whether the result of the assignment being acted upon would be to disable him from carrying

on his trade, but whether he would thereby be rendered insolvent. *Wedge v. Newlyn* and *Carr v. Burdiss*. There was no fraudulent intent here, and it was not left to the jury to say whether the deed being acted upon, would have produced insolvency, but only whether it would have disabled him from carrying on business as a worsted-spinner. An assignment may be fraudulent either under the statute of Elizabeth, or as a fraud upon the bankrupt laws, by preventing an equal distribution of the assets, or as necessarily resulting in the delay of all the creditors, except the one to whom it is made. That is an act of bankruptcy, because the necessary consequence is taken to have been contemplated; and *Graham v. Chapman* was a case of this kind, although it was for an advance to enable the trader to carry on his trade, for it was a conveyance of all the trader's property, and would, therefore, defeat the claims of the other creditors. In this case I think there ought to be a nonsuit entered.

ALDERSON, B. I am of the same opinion. The bankrupt in this case sold his goods to Messrs. Brooks, and wished to have cash for them, but not being able to get it, took bills; the bankrupt then puts his name on the bills and gets them discounted, whereupon this mortgage of the machinery was given as a further security, for the satisfaction of the person who discounted the bills. The only question, therefore, is, whether such a security so given, being for less than half of the mortgagor's effects, amounts to an act of bankruptcy; and I think it does not.

PLATT, B. I agree with the observations of my brother Alderson, as to the deed. If the bankrupt had had any distrust in Messrs. Brooks, he would not probably have given the mortgage security; but he evidently expected they would pay the bills when due. If this be so, how can it be said that he really intended to defeat or delay his creditors? or how is it an act of bankruptcy? He had, it appears, property to the amount of 3,500*l.*, and pledged 1,500*l.* worth of his machinery, to remain as a security for the payment of these bills. Had it been an assignment of his whole property, with a colorable exception, which, in fact, would be no exception, the case would have been different; but this is not so here; this was rather to meet, as it seems to me, the demand of his creditor.

Rule absolute to enter a nonsuit.

Palmer v. Trower.

PALMER v. TROWER, executor of TROWER.¹

November 6, 1852.

Evidence — Contradiction of Witness — Collateral Issue.

The defendant being sued as executor of A, in respect of a promissory note, purporting to be signed by A and B, but alleged by the defendant to be forged, stated, in cross-examination, that he had not heard B admit having signed the note:—

Held, that the plaintiff was not at liberty to contradict the defendant by showing that the latter had heard B make the admission.

THIS was an action of *assumpsit*, to recover from the defendant, as executor of his grandfather, the sum of 20*l.*, being the amount of a joint and several promissory note made by the grandfather, and the father of the defendant. The defendant denied the making of the note.

At the trial, before Pollock, C. B., at the last Norfolk summer assizes, the defence was, that the note had been forged. It appeared that on an investigation before certain magistrates, at which it became material to inquire into the genuineness of the note, the defendant's father stated that he had not signed the note. The defendant, in his cross-examination, was asked whether he had not subsequently heard his father say that he was sorry he had forgotten to state before the magistrates that he had, in fact, signed the note. This question was answered in the negative. The plaintiff's counsel then proposed to call a third party, in whose presence the father had made the statement; for the purpose of proving that that statement had been made by the father, and had been heard by the son, the defendant. This evidence was objected to on the part of the defendant, and refused by the learned judge.

O'Malley now moved for a new trial, on the ground *inter alia* of the improper rejection of this evidence. The evidence was improperly rejected.

[ALDERSON, B. I think you were not entitled to call a witness to show that the father did make use of the expressions in question in the presence of the defendant. How is the statement of the father material? It may, indeed, go to the credit of the defendant, the witness; but the issue raised is a collateral one. It is the statement in the presence of the defendant of a fact not within his own knowledge. The case would have been different if the statement had been made in the presence of the grandfather, who was represented by the defendant.

POLLOCK, C. B. I consulted my brother Parke on the point, and I

¹ 22 Law J. Rep. (N. S.) Exch. 32.

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believe he considered it was not competent for the plaintiff to contradict the witness in the manner proposed.]

*Per Curiam.*¹ There will be no rule on this point.²

Rule refused.

STRICKLAND v. SARAH TURNER, executrix of E. H. LANE.³

January 31, 1852.

Purchase of Annuity—Failure of—Assumpsit for the Money Paid.

E. H. L., who resided at Sydney, New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to certain trustees, to dispose of it for his benefit. The plaintiff entered into a correspondence, by letter, with the trustees upon the subject of the purchase, and from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon and settled until the 28th of February, 1849. Upon the 6th of that month, the annuitant died. The purchase-money was paid by the plaintiff, in ignorance of the fact, and was ultimately received by the executrix of the deceased:—

Held, that, as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase-money from the executrix, on the ground that the money had been paid without consideration.

ASSUMPSIT for money had and received by the defendant, as executrix of Edward Henry Lane, deceased. Plea, *non assumpsit*, and issue thereon.

By mutual consent and by a judge's order, a case, of which the following are the material facts, was stated for the opinion of this court.

The action was brought to recover the sum of 973*l.* 11*s.* under the following circumstances:—Edward Henry Lane, of Sydney, New South Wales (the testator), was entitled for his life to an annuity of 100*l.* per annum, payable half-yearly, on the 30th of March and the 30th of September, bequeathed to him under the will of a Mrs. Way.

The plaintiff was one of the executors, and the residuary legatee, of Mrs. Way.

On the 4th of June, 1847, Mr. Lane, then residing at Sydney, transferred the annuity by deed to Arthur Daintrey and Adrian Daintrey, who resided in England, to dispose of as his trustees and for his benefit.

In November, 1847, a correspondence was entered into between the Messrs. Daintrey, and a Mr. Cookney, the attorney and agent of the plaintiff, upon the subject of the purchase of the annuity by the plain-

¹ POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

² A rule was granted on another ground.

³ 7 Exchequer Rep. 208.

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tiff. After much correspondence on the subject, the following letters passed between Mr. Cookney and Mr. Adrian Daintrey:—

“December 16th, 1848.

“Dear Sir,—I shall be extremely obliged by an early and definitive answer on the subject; for if Mr. Strickland does not purchase, there are other persons ready to treat. I am, &c.

“J. T. Cookney, Esq.

“A. DAINTREY.”

“21st December, 1848.

“Dear Sir,—I fear if you can get a purchaser for much, if any thing, beyond 1,000*l.* after April next (as at that time another half-year's annuity will be due less a year's duty), that Mr. Strickland will decline treating for it. My view is, that a purchaser ought, to buy the annuity, to pay 6 per cent. at least, and to insure the life would cost nearly 3 per cent., and that would be 9 per cent. for the purchase-money. This would make the outside value 1,100*l.*, 11 times 9 being 99, and the expense of purchase would far exceed another 1*l.* per annum. Supposing Mr. Lane to be dead when you sell, how do you propose securing the purchaser against this contingency? for, unless the insurance office would undertake to pay the money, a purchaser cannot be advised to part with his. Most probably you have considered these matters, and will favor me with your sentiments thereon.

“I am, &c.

“A. Daintrey, Esq.

“J. T. COOKNEY.”

“December 22d, 1848.

“Dear Sir,—Assuming that Mr. Strickland will purchase, I am in a condition immediately to convey, as I have a discretion to sell as low as 1,000*l.* I will do so if Mr. Strickland will agree to purchase at that sum. This agreement to purchase would of course be conditional on my showing a good title to convey. My brother is in practice as a solicitor in Sydney, and he is concerned for Mr. Lane, who, when I last heard from my brother a short time since, was as well as ever.

“J. T. Cookney, Esq.

“A. DAINTREY.”

After a few other letters, the following letters passed between the same parties:—

“26th January, 1849.

“Dear Sir,—I have heard from Mr. Strickland, and although his full object will not be accomplished, he is willing to give 1,000*l.* for the annuity; and looking, as you say, to the loose mode of the bequest, I think the offer a liberal one. If accepted, then the only point to be considered is, how the sale is to be completed in the absence of proof of Mr. Lane being alive.

“Yours, &c.

“J. T. COOKNEY.”

“27th January, 1849.

“Dear Sir,—I accept Mr. Strickland's offer of 1,000*l.* for this annuity on the following conditions:—1st, That he take an assign-

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ment of the annuity from myself and my brother Adrian, under the assignment to us, a copy of which I enclose. 2dly, That the purchase be completed within one month from this day. 3dly, That Mr. Lane be at no expense about showing a title to the annuity, and that no deductions be made on account of legacy-duty remaining unpaid. 4thly, That the annuity, or a proportion of it, be paid up to the day of completion. Probably the signature of Mr. Lane to the original assignment may be known to yourself or Mr. Strickland.

* * * * *

"If the conditions are acceded to, I will come to town and settle as soon as you are prepared. My brother Adrian is resident there. I shall be much obliged by despatch. Proof of Mr. Lane's being alive will not of course be at all necessary.

"I am, &c.

"A. DAINTREY."

"31st January, 1849.

"Dear Sir,—The offer I made had reference to my letter of the 21st of December last, namely, the purchase of an annuity of 100*l.*, to be completed next April after the half year's annuity was paid and the duty satisfied, and having the balance of duty 18*l.* 2*s.* 4*d.* allowed out of his purchase-money. This my client will be prepared to do on the 30th of next April,¹ unless the money is an object before, and in that case my client will be content to take 5*l.* per cent. upon his purchase-money to the 30th of April,² and give credit for the annuity, subject to the deduction for legacy duty, thus:—

	£	s.	d.
Say purchase money	1,000	0	0
Half year's annuity to 30th April	50	0	0
	1,050	0	0
A year's interest on 18 <i>l.</i> 2 <i>s.</i> 4 <i>d.</i> fourth year's duty		0	18 0
			1,050 18 0
Deduct 3d year's duty	18	2	4
4th ditto	18	2	4
2 month's interest from 28th of February to 30th of April on 1,000 <i>l.</i>	8	6	8
		44	11 4
	£1,006	6	8

"If you are content with this arrangement I will proceed to raise the money, and let you have the draft assignment in a few days.

"I am, &c.

"J. T. COOKNEY."

"1st February, 1849.

"Dear Sir,—If your letter of the 31st of January is to be read in connection with that of the 21st of December, the latter certainly

¹ Sic.

² Sic.

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favors the offer I have made; for it informs me that Mr. Strickland would not give more than 1,000*l.* after April, when of course the instalment of an annuity and duty would have been paid. I am sure that upon reference to this letter you will see that this is the fair construction of it, and I think, therefore, that the conditions of my last letter ought to be acceded to.

"I am, &c.

"A. DAINTREY."

"3d February, 1849.

"Dear Sir,—I only referred you to my letter of the 21st of December, as evidence of what I thought the value of an annuity of 100*l.*, and that it was the object in view. Mr. Strickland does not, and did not, entertain my views, but considers the offer made in my last letter very fair and liberal.

"Mr. S. will be glad to know if the offer will be accepted, and particularly if the money is to be paid this month.

"Yours, &c.

"J. T. COOKNEY."

"5th February, 1849.

"Dear Sir,—If Mr. Strickland will not give more than you say, I must accept the offer. I assume of course that the last half year's annuity has been paid. I should like to have the draft assignment as soon as possible, and to complete with all despatch, as Sir C. F.'s son is going out in about ten days, and will take charge of my papers to my brother.

"I am, &c.

"A. DAINTREY."

"19th February, 1849.

"Dear Sir,—I have been expecting the draft assignment as promised in a few days by your letter of the 31st ult. I hope to receive it without delay.

"I am, &c.

"A. DAINTREY."

"20th February, 1849.

"Dear Sir,—I send you draft assignment and release. I think that the consideration liable to *ad valorem* duty will be 973*l.* 11*s.* 0*d.*, if the money is paid on the 28th inst. instead of the 30th April next; what say you?

"I am, &c.

"J. T. COOKNEY."

	£	s.	d.
Amount of nominal consideration	1,000	0	0
Less 4th year's duty	18	2	4
and interest on prompt payment	8	6	8
	<hr/>		
	26	9	0
Net consideration,	973	11	0
	<hr/>		

"23d February, 1849.

"Dear Sir,—I return your draft approved, with some slight alterations. I propose to settle at your office on Wednesday, the 28th inst., at 10 o'clock, unless I hear from you to the contrary by return,

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and have made an appointment with my brother to that effect. I dare say you will favor me with a line by return at all events.

"I am, &c.

"A. DAINTREY."

"24th February, 1849.

"Dear Sir, — I conclude the assignment to you is stamped; if not, you will of course get it done. The time you mention will suit very well.

"Yours truly,

"J. T. COOKNEY."

"25th February, 1849.

"Dear Sir, — The assignment to myself and brother is not stamped, nor I believe is a stamp necessary, &c. Be pleased to let me hear from you by return, and let me have the engrossment here by return, or at, &c., on Tuesday evening by seven o'clock. My brother will attend there to execute, and it is probable he will be obliged to leave London on Wednesday morning.

"I am, &c.

"A. DAINTREY."

"26th February, 1849.

"Dear Sir, — I am sorry to differ with you about the stamp duty. I am quite satisfied you could not compel a purchaser to take to the title without a 35s. on the assignment to you, and the office would stamp it. I should like to see the deed of assignment to you which my clerk can do when he attends at, &c., to-morrow, to see your brother execute the proposed deed of sale to Mr. Strickland.

"I am yours, truly,

"J. T. COOKNEY."

By indenture, bearing date the 28th of February, 1849, and then made between the said Arthur and Adrian Daintrey of the one part, and the plaintiff of the other part, after reciting that the said E. H. Lane was entitled to the said annuity, &c., for his life, and also reciting (*inter alia*) the said assignment of the 4th of June, 1847; and that the plaintiff, as such residuary legatee as aforesaid, had duly paid the said annuity for the use of the said E. H. Lane up to the 30th day of March next; and also reciting the said indenture of the 4th day of June, 1847, and that the said Messrs. Daintrey had contracted with the plaintiff for the absolute sale, &c., to him of the said annuity, and all growing and future payments thereof, for the price of 973*l.* 11*s.*, it was witnessed that, in pursuance of the said contract, and in consideration of the sum of 973*l.* 11*s.*, the said Messrs. Daintrey did grant, bargain, sell, &c., unto the plaintiff, his heirs, &c., all the said annuity or sum of 100*l.*, and all growing and future payments thereof, to have and to hold the said annuity unto the plaintiff, his heirs, &c., from henceforth during all the residue of the life of the said E. H. Lane, to the end and intent that the plaintiff, his heirs, &c., might be entitled to receive and retain the same for his and their own use and benefit.

The consideration money, amounting (exclusively of the arrears of the said annuity) to 973*l.* 11*s.*, was paid on behalf of plaintiff to

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the said Arthur Daintrey. And the following receipt was then signed by the said Arthur Daintrey, the sum of 86*l.* 19*s.* therein mentioned having been paid on the same day:—

“ Re Edward Lane’s Annuity.-

“ 28th of February, 1849.

“ Received balance of one year’s annuity to the 30th March next, namely, the sum of 86*l.* 19*s.*, after giving credit for legacy duty payable in respect of the said annuity.

“(Signed) A. DAINTREY,

“ (For Self & Co. — trustee).”

Annuity,	£100	0	0
Deduction, . . .	13	1	0
	<hr/>		
	£86	19	0

The transaction was perfectly *bond fide*.

It was subsequently ascertained, that the said E. H. Lane died at Sydney on the 6th of February, 1849, having previously made his will, and having appointed the defendant sole executrix thereof. The said sum of 973*l.* 11*s.* 0*d.* was paid by the said Arthur Daintrey into the Bank of Australasia, to the account of the said E. H. Lane, before the news of his death reached this country. It was admitted, that the same was, with the plaintiff’s concurrence, received by the defendant as executrix of the said E. H. Lane after his death, subject to be refunded to the plaintiff, if, under the circumstances, the plaintiff should be so entitled.

The court were to be at liberty to draw any such inference from the facts of the case as a jury would be warranted in drawing.

The question for the opinion of the court was, whether, under the foregoing circumstances, the plaintiff was entitled to recover from the defendant, as executrix of E. H. Lane, the said sum of 973*l.* 11*s.* so paid; and judgment was to be entered in accordance with the opinion of the court.

Crowder (Raymond with him) for the plaintiff. The plaintiff is entitled to recover the money he has paid, on the ground that there is an entire absence of consideration for the payment. This is a contract for the sale of an annuity; and at the time it was sold, it had ceased to exist. The annuitant died on the 6th of February, but there was no contract for the sale until long after that day, for the contract was completed on the 28th of February, by the deed which was then executed.

[MARTIN, B. If a chattel is sold, and at the time of the sale the chattel does not exist, the contract is not binding upon the purchaser. *Barr v. Gibson*, 3 M. & W. 390.]

And therefore, unless the defendant can establish the proposition, that the contract for the sale was complete before the 6th of February, the plaintiff’s claim at law to the return of the money is unanswerable.

Bramwell (*Rew* with him) for the defendant. The correspondence shows, that it was the intention of the parties that the sale of the annuity should be complete on the 5th of February. It was not a mere agreement for a sale. The execution of an instrument under seal is not essential to the validity of the transfer. The letters, therefore, do not amount to a contract for a future sale, to be embodied in the deed, but they contain the terms of the contract itself, by which contract the whole of the vendor's interest in the annuity passed on the 5th of February. In 1 Sugd. on Vend. and Purch., 11th ed., 330, it is said, "A vendee, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the date of the agreement and the conveyance; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim." And again, at page 334 it is laid down, that "it equally follows, from the general rule of equity, by which that which is agreed to be done is considered as actually performed, that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract." This is supported by the cases of *Mortimer v. Capper*, 1 Bro. C. C. 156; *Kenney v. Wexham*, 6 Madd. 355; *Vessey v. Elwood*, 3 Dru. & War. 74; *Harford v. Purrier*, 1 Madd. 532; *Paine v. Meller*, 6 Ves. 349; *Anson v. Towgood*, 1 Jac. & Walk. 637; *Coles v. Trecothick*, 9 Ves. 234. The contract of the 5th of February is for a present and not a future sale of the annuity. *Tarling v. Baxter*, 6 B. & C. 360; *Rugg v. Minett*, 11 East, 210; or, at all events, it was a sale of the vendor's interest at that time. The deed operates as a mere authentication of the transfer; and moreover, it recites a past contract.

Crowder, in reply, contended that there was no contract on the 5th of February; that the deed spoke of the conveyance of the annuity as being "from thenceforth;" and, consequently, that the plaintiff had never received any consideration for his money.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. The question in this case, which the court took time to consider, lies in a very narrow compass. The plaintiff brought his action against the defendant to recover back money paid by him for the purchase of an annuity bequeathed to Edward Henry Lane, of Sydney, New South Wales, by the will of Mrs. Elizabeth Way. That annuity had been assigned by Edward Henry Lane, who was still residing in Sydney, to Arthur Daintrey and Adrian Daintrey, in order that they, as his trustees, might dispose of it in England for his benefit. They accordingly entered into a negotiation with the plaintiff, who was the residuary legatee under Mrs. Way's will, for the purchase of this annuity. The question between the parties is

this — whether the purchase took effect during the existence of the annuity. If it did, though but for an instant, the plaintiff is not entitled to succeed; for he purchased the annuity, and cannot complain that in so doing he has made a bad bargain, as the events have turned out. But if, on the contrary, the annuity had ceased to exist before his purchase, then he has got nothing for his purchase-money, and is entitled to recover it back from the defendant, the executrix of Lane, who has received it from the trustees.

The question therefore is, what was the bargain, and when did it take effect. If the annuity was sold upon the 5th of February, 1849, by the acceptance contained in the letter of that date, the subsequent death of the annuitant at Sydney on the 6th of February, 1849, will defeat the plaintiff's claim. If, on the other hand, the agreement was for a future sale, to be effected by assignment of the annuity, which took place on the 28th of February, the previous death of the annuitant will entitle the plaintiff to recover.

We must, therefore, examine carefully the different letters and documents, to see which of these two views of the case we ought to adopt as the fair result of the whole correspondence. There is no doubt, that, if the purchase had been completed, that is to say, if there had been an agreement that from and after the 5th of February, 1849, the annuity was to belong to Mr. Strickland, and the money given for it to belong to the trustees, the subsequent death of Lane would make no difference. Even a bill for a specific performance could have been maintained upon such an agreement, according to the case of *Kenney v. Wexham*, 6 Madd. 357. There there was an agreement dated 18th April, 1818, for the future purchase of an annuity by the payment of two instalments, the first in October, 1818, and the last in January, 1819. The death was subsequent to the last stipulated payment. And the Vice-Chancellor held, that from that date the purchaser became entitled to it, and that the subsequent death of the annuitant in October, 1820, did not prevent the purchaser from having a specific performance; and for this *Mortimer v. Capper*, 1 Bro. C. C. 156; *Jackson v. Lever*, 3 Bro. C. C. 604; *Coles v. Trecothick*, 9 Ves. 234, were cited.

But here in the correspondence we find no such arrangement till the assignment of the 28th of February. The offer which is stated by Mr. Strickland's agent, Mr. Cookney, in the letter of the 31st January, 1849, is for the purchase of the annuity "to be completed next April, after the current half year's annuity is paid, and the legacy duty then payable satisfied, and the future legacy duty allowed for;" and he adds, that his client will be prepared to do this on the 30 of April, unless they can agree for an earlier day of payment, and, so to speak, to discount the payment of the 30th of April on that earlier day.

It is a clear stipulation throughout the correspondence, that the annuity shall continue to be paid up to that day, whatever that might be; and until that day was fixed it is impossible to ascertain what sum of money was to be paid and received. Now this was never ascertained or settled in the life-time of the annuitant. The annuity,

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therefore, still continued to belong to Lane, and never, as the Vice-Chancellor says in *Kenney v. Wexham*, passed to the purchaser, till this was ascertained and the bargain finally arranged between them. When this was done, the annuity became the property of Strickland, and the money the property of the vendors. But then there was no annuity in existence. The money, therefore, which was paid, was paid wholly without consideration, and may now be recovered back from the defendant, to whom, as the executrix of Lane, it has passed. We think, therefore, that the judgment should be for the plaintiff.

Judgment for the plaintiff.

GARBY v. HARRIS.¹

April 27, 1852.

Costs — Certificate of Judge.

Under the 12th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, a judge has power to certify for costs, where the sum recovered in actions of contract is 20*l.*, and in tort 5*l.*

This was an action for assault, which was tried before Talfourd, J., at the last Cornwall assizes, when a verdict was found for the plaintiff, with 5*l.* damages, and the learned judge certified, under the 13 & 14 Vict. c. 61, s. 12, that there was sufficient reason for bringing the action in the Superior Court. Upon this certificate the Master taxed the plaintiff his costs.

Collier now moved to review the Master's taxation. The plaintiff's right to costs depends upon the construction of the 11th & 12th sections of the County Court Extension Act, 13 & 14 Vict. c. 61. The 11th section enacts, "That, if in any action, commenced after the passing of this act, in any of her Majesty's superior courts of record, in covenant, debt, detinue, or *assumpsit*, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*, or if, in any action commenced after the passing of this act, in any of her Majesty's superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in cases hereinafter provided, and except in the case of a judgment by default," &c. The plaintiff is not entitled to costs under that section, inasmuch as he has recovered a sum not exceeding 5*l.* Then, by section 12, it is provided, "that if the plaintiff shall in any such action

¹ 7 Exchequer Rep. 591.

Garby v. Harris.

as aforesaid, recover a sum less than the sum in that behalf hereinbefore mentioned, by verdict, and the judge or other presiding officer, before whom such verdict shall be obtained, shall certify, &c., the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not passed." The sum "thereinbefore mentioned" is 5*l.*, consequently the judge had no power to certify under that section, as the plaintiff did not recover less than 5*l.* This may be a *casus omissus*, but the court are bound to give effect to the grammatical construction of the statute, and cannot correct the mistakes of the legislature.

[PARKE, B. The meaning of the 12th section is, that if the plaintiff does not recover the sum which entitles him to costs under the 11th section, the judge may certify to give him costs. If the strict grammatical construction leads to an absurdity, the language of the statute may be modified.

MARTIN, B. Though the court cannot supply an omission, they may read a statute so as to render it sensible and intelligible.]

The 37 Geo. 3, c. 111, s. 3, exempted from stamp duty any indenture of apprenticeship, "where a sum or value not exceeding 10*l.* shall be given or contracted with, or in relation to the apprentice," and that was held not to apply to cases where no sum or value was given or contracted for. *Rex v. The Inhabitants of Mabe*, 3 A. & E. 531.

POLLOCK, C. B. I think there ought to be no rule. I agree that where the language of a statute is perfectly plain, we have no right to alter it in order to correct an error or omission of the legislature. But where the question is one of construction, and there are several different modes of reading the statute, we are bound to adopt that which most accords with the intention of the legislature. Now, in construing these sections, Mr. Collier assumes that there is a particular sum specifically mentioned in the 11th section, which he has a right to transfer to the 12th, for the "sum in that behalf hereinbefore mentioned." But that is not so; the one clause makes one provision, the following clause another provision. It is manifest that the 12th section was intended to provide for cases where the sum recovered would not carry costs. What then is the meaning of the words "the sum in that behalf hereinbefore mentioned?" It is clear that they mean a sum which would carry costs. By so reading the statute, I do no violence to its language, but of two different constructions select the one which appears to me the true meaning of the language of the legislature.

PARKE, B. If the statute is to be read according to its strict grammatical construction, Mr. Collier is right. But there is a valuable rule which has been acted on for years, namely, that a statute must be construed according to its ordinary grammatical signification, unless such a construction would lead to some repugnance or absurdity, in which case the language may be modified so as to avoid that. This case falls within that rule. In order to make sense of these sections, we must construe them in the manner suggested by the lord

chief baron. The words in the 12th section, "the sum in that behalf hereinbefore mentioned," mean a sum which would entitle the plaintiff to costs; and if a less sum than that is recovered, the judge has power to certify.

PLATT, B. These two sections must be read with a candid mind, and a desire to understand the intention of the legislature. No one could imagine that the legislature meant, that where, in actions of contract, the plaintiff recovered 20*l.*, the judge should not have power to certify for costs; but where the verdict was for 19*l.* 19*s.* 11 $\frac{3}{4}$ *d.*, he should have that power; or if, in actions of tort, the verdict was for 5*l.*, the judge could not certify, but if it was for one farthing less he might. That being an obvious absurdity, we must give a reasonable construction to the 12th section, and, for that purpose, look to the meaning of the legislature as collected from the two sections read together. If the sum recovered exceeds 20*l.* in actions of contract, or 5*l.* in actions of tort, the plaintiff is entitled to costs without the interference of the judge; but if not, it is in the discretion of the judge to give costs under the 12th section. It is no answer to say that this is a *casus omissus*, if by reading both sections together we can find out the meaning of the legislature. It is perfectly plain to my mind that the person who penned this act, instead of using the words "not exceeding" put in the 12th section the words "less than." If the former words be substituted, the meaning is clear. Since then the intention of the legislature is manifest, we ought not to tie ourselves to a literal reading, which would do substantial injustice.

MARTIN, B. I am of the same opinion. Even upon a literal construction of the statute, Mr. Collier fails. The language of the 12th section is, "if the plaintiff in any such action as aforesaid, shall recover less than the sum in that behalf hereinbefore mentioned;" it is not "recover the sum hereinbefore mentioned," but "the sum in that behalf hereinbefore mentioned," which points to the sum which, under the previous section, entitles the plaintiff to costs. I further think that we ought to read this act of parliament as we would any other document, with a view to understand it, and give it a reasonable construction. The legislature clearly meant that, when the sum recovered was not more than 20*l.*, or 5*l.*, as the case might be, the judge should have power to give the plaintiff costs.

Rule refused.

WILLIAMS v. ROBERTS and others.¹

April 26, 1852.

Landlord and Tenant — Distress for Rent — Pleading.

To a declaration in trespass, for breaking and entering a close of the plaintiff, called the stable, and breaking the doors thereof, and for seizing and carrying away divers goods and chattels of the plaintiff therein, the defendant pleaded, under the 11 Geo. 2, c. 19, s. 1, that, at the time when the trespasses were committed, one O. O. was tenant of certain premises to the defendant at a certain rent, and that half a year's rent was then due to the defendant from the said O. O., and in arrear and unpaid; and that, within thirty days before the said time when, &c., O. O. fraudulently and clandestinely conveyed from the premises held by him as such tenant, the goods and chattels in the declaration mentioned, being the proper goods and chattels of the said O. O., in order to prevent the defendant from distraining them for the rent in arrear; and that, because the said goods and chattels so fraudulently and clandestinely conveyed by O. O. still remained in the said close in which, &c., and were there locked up, to prevent them from being seized as a distress for the said arrears of rent, the defendant, whilst the rent remained due, and within thirty days after the said goods and chattels had so been clandestinely and fraudulently conveyed and locked up, entered the said close, in order to seize and take the said goods and chattels as a distress for the said arrears of rent so due, and did at the time when, &c., and within thirty days after the said goods and chattels had been so conveyed as aforesaid, seize them as a distress for the said arrears of rent; and that, because on that occasion the said goods and chattels were put and kept in the close locked up, so as to prevent them from being seized as a distress for the said arrears of rent, and so that the defendant could not, without breaking open and entering the said close, seize the said goods, the defendant was obliged and did, in order to seize the said goods, first calling to his assistance the constable of the place where the said close and goods were, according to the form of the statute, and with his aid and assistance, in the day-time break open and enter the said close, in order to seize the said goods and chattels for the said arrears of rent, according to the statute; and that the defendant in so doing did no unnecessary damage, &c.:—

Held, first, that although it was stated in the plea that the goods were the tenant's at the time of the removal, it admitted them to be the plaintiff's at the time of the seizure, as averred in the declaration, and therefore, that the plea was not objectionable in form, as amounting to an argumentative traverse that at the time of the trespass they were the goods of the plaintiff.

Held, secondly, that the plea afforded a good *prima facie* defence to the action within the 11 Geo. 2, c. 19, s. 1. It is unnecessary, in a plea framed under this statute, to show that the goods have not been made the subject of a *bond fide* sale to persons not privy to the fraudulent removal, as provided by the 2d section; that fact must be replied.

It is also unnecessary to state in the plea, that the party upon whose land the goods are seized is privy to the fraud; and a previous request is unnecessary, in order to give the landlord the right to break into the premises for the purpose of seizing the goods.

TRESPASS. The declaration stated that the defendants broke and entered a certain close of the plaintiff, called the stable, in the county of Carnarvon, and broke open, pulled down, and damaged two doors of the plaintiff, of and belonging to the said close, and then broke and spoiled divers locks of the plaintiff, belonging to the said doors, and then seized divers goods and chattels of the plaintiff, to wit, five horses, &c., therein, and then took and carried away the same, and converted them to the defendants' own use, &c.

The defendants pleaded, first, not guilty; secondly, that the said

close, doors, &c., were not the plaintiff's, *modo et formâ*; thirdly, that the goods and chattels were not the plaintiff's *modo et formâ*. Upon these pleas the plaintiff joined issue.

The defendants pleaded, fourthly, to the whole declaration, that one Owen Owens for a long time, to wit, for the space of half a year next before and ending on the first day of September, 1850, and from thence until and at the said times when, &c., held and enjoyed a certain water corn-mill and premises, situate in the parish of Aber, in the county of Carnarvon, under and by virtue of a certain demise thereof theretofore, to wit, on the first day of September, 1849, made by the defendant, E. G. Roberts, to the said O. Owens, for the term, to wit, of one year from thence next ensuing, and so on from year to year, and so long as the said defendant and the said O. Owens should respectively think fit, at and under the yearly rent of 130*l.*, payable half yearly, by even and equal portions, the reversion thereof, to wit, in fee, then and still belonging to the defendant, the said E. G. Roberts; and further, that, on the day and year first aforesaid, a large sum of money, to wit the sum of 65*l.* of the rent aforesaid, for half a year of the said term, ending on the same day and year, became and was due and payable from the said O. Owens to the defendant, the said E. G. Roberts, and at the several times when, &c., was in arrear and unpaid; and that the said O. Owens, after the said rent became and was due and payable, and whilst the same was actually due, in arrear, and unpaid, and within thirty days next before the said several times when, &c., fraudulently and clandestinely conveyed and carried off and from the said premises so held and enjoyed by him as such tenant thereof as aforesaid, the said goods and chattels in the said declaration mentioned, being the proper goods and chattels of him, the said O. Owens, in order to prevent the said defendant from distraining the same for the said rent so before and at the time of the said removal actually due, in arrear, and unpaid as aforesaid; and for that purpose conveyed the said goods and chattels, in the said declaration mentioned to the said close in which, &c.; and because the said goods and chattels, which had been so fraudulently and clandestinely conveyed away and carried off by the said O. Owens as aforesaid, still remained and were in the said close in which, &c., to which the same had been so conveyed as aforesaid, and were there kept locked up, so as to prevent them from being seized and taken as a distress for the said arrears of rent, the said E. G. Roberts, in his own right, and the said other defendants as the servants of the said E. G. Roberts, and by his command, afterwards, and while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days next after the said goods and chattels were and had so been fraudulently and clandestinely conveyed away and carried off as aforesaid, and whilst they remained so kept locked up as aforesaid, that is, at the times when, &c., entered into the close in which, &c., in the said declaration mentioned, in order to seize and take the said goods and chattels so therein being as aforesaid, as a distress for the said arrears of rent so due and owing as aforesaid, and did, thereupon, at the several times when, &c., and within thirty days next

after the said goods and chattels had been and were so fraudulently and clandestinely conveyed away and carried off as aforesaid, in the said close in which, &c., take and seize the said goods and chattels so there found as a distress for the said arrears of rent, the same then remaining due, in arrear, and unpaid; and because, on the occasion aforesaid, the said goods and chattels had been and were put and kept in the said close in which, &c., locked up, so as to prevent them from being taken or seized as a distress for the said arrears of rent, and so that the defendants could not, without breaking open and entering the said close, seize the said goods as aforesaid, the defendant, E. G. Roberts, in his own right, and the other defendants, as bailiffs of the said E. G. Roberts, and by his command, on the occasion and at the time aforesaid of entering and taking the said goods in the said close, were forced and obliged to, and did, in order to seize the said goods as aforesaid, first calling to their assistance the constable of the place where the said close and goods were, according to the form of the said statute, and with his aid and assistance, in the day-time, break open and enter the said close, in order to take and seize, and did then as aforesaid, take and seize, the said goods and chattels for the said arrears of rent, according to the said statute; and in so breaking and entering the said close did, to a small and necessary extent, commit the supposed trespasses, so far as they relate to the said doors, locks, &c.; and the defendants, on the occasion aforesaid, did no unnecessary damage, and no more than was necessary to enable them to seize the said goods as aforesaid, for the purposes aforesaid. Verification.

Special demurrer to the fourth plea, on the grounds (*inter alia*) that it was improperly pleaded to the whole declaration; that the statement in the plea, that the goods and chattels were the property of the said Owen Owens, was inconsistent with the allegation in the declaration, that they were the plaintiff's; and that it amounted to an argumentative traverse of the goods mentioned in the declaration being the plaintiff's as therein alleged. Joinder in demurrer.

The case was argued in last Hilary term, (Jan. 19,) by

Cowling (*Welsby* with him) in support of the demurrer. The fourth plea, which professes to be framed under the 11 Geo. 2, c. 19, is bad in form and in substance. First, as to the question of form; the plea amounts to an argumentative denial that the goods seized were the goods of the plaintiff. If, on the other hand, the plea should be taken to admit that the goods were the plaintiff's, in that case it is no answer to the action. *Fletcher v. Marillier*, 9 Ad. & E. 457, is an express authority that the plea amounts to an argumentative traverse. *Lord Denman*, C. J., in delivering the judgment of the court in that case says, "The justification asserts that the goods were the property of one Stent; that they had been fraudulently removed by him from a house which he held as tenant to the defendant, in order to avoid a distress for rent in arrear; and that they had been placed in the plaintiff's house with her privity and consent, against the form of the statute; and then goes on to justify entering the house in

order to seize the goods, and the seizing them under the provisions of 11 Geo. 2, c. 19, s. 7. If by this plea it be meant to deny that the goods, at the time of the seizure, were the goods of the plaintiff, the denial is plainly indirect and argumentative, and the plea is bad for that reason, which is assigned as cause of demurrer; if, on the other hand, the plea be taken to admit the goods to have been, at the time of the seizure, the goods of the plaintiff, then the plea is bad, in not bringing the case within the 11 Geo. 2, c. 19. That statute authorizes the landlord to follow goods only which belonged to the tenant at the time of removal; and not even those, if *bonâ fide* transferred to an innocent person for value; that is, in effect, goods which, at the removal were, and at the time of the seizure continued to be, the goods of the tenant. It is obviously inconsistent with the right to seize under the statute, to admit that, at the time of the seizure, they were the goods of the plaintiff, not being the tenant."

[PARKE, B. It is not necessary, under the statute, that the goods should be the tenant's at the time of the seizure, although they must be so at the time of the removal, to give the landlord the power of distraining them. For if the goods have been transferred by gift, or have even been the subject of a sale not made *bonâ fide*, the landlord has a right to seize them.]

The plea does not give the plaintiff any colorable title to the goods, but leaves it altogether *in dubio* whether the goods were his or not. 2 Wms. Saund. 84 e. note (e.) The plea is, therefore, informal.

[MARTIN, B. The defendant could not have given this defence in evidence under a traverse that the goods were the goods of the plaintiff.]

Secondly, the plea is bad in substance. By the 7th section of the 11 Geo. 2, c. 19, a landlord can upon certain conditions only seize goods fraudulently and clandestinely removed from the demised premises. The statute expressly requires the concurrence of two things, to give the landlord this right: first, it must be shown that the goods have been unlawfully removed; and secondly, that they have not been legally sold. The second section provides, that no landlord shall seize goods "which shall be sold *bonâ fide* and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid." This section imposes a condition precedent upon the landlord's right of distress. The defendant, therefore, should have distinctly shown that the goods were not so transferred before the seizure. In 1 Wms. Saund. 233 b. note (d), it is laid down, that "a proviso is properly the statement of something extrinsic of the subject-matter of a covenant, which shall go in discharge of that covenant by way of defeasance; an exception is, a taking out of the covenant some part of the subject-matter of it. If these be right definitions, the plaintiff need never state a proviso, but must always state an exception." It, therefore, lies upon the defendant to show that the transfer of the goods was illegal. Where, in answer to an action on a bill of exchange, the defendant pleads that it was illegal in its inception, and that the plaintiff took it without value, to which the plaintiff replies *de injuriâ*, the illegality being

proved, the *onus* is cast upon the plaintiff of proving that he gave value: *Bailey v. Bidwell*, 13 M. & W. 73. In *Thornton v. Adams*, 5 M. & Sel. 38, it was held that the plea must show that the goods removed were the tenant's at the time of the removal. The plea is also bad, because it does not contain any statement that the plaintiff in any way participated with the tenant in the illegal removal or custody of the goods. It must, therefore, be taken that the plaintiff was ignorant of the fact, and that he was not a party to the transaction. The plea does not even state that the goods were placed on the plaintiff's close by his consent. In *Fletcher v. Marillieur*, 9 Ad. & E. 457; *Rich v. Woolley*, 7 Bing. 65, and *Angell v. Harrison*, 17 Law J. Rep. (N. S.) Q. B., 25, the pleas severally contained an allegation to the effect that the defendant was a participator in the illegal act of the tenant. The third section shows that the legislature intended to punish the tenant who defrauded his landlord, and the party assisting him; but they never could have meant that the statute should thus affect an innocent party.

In the next place, as it must be presumed that the plaintiff is an innocent party, it ought to have been averred in the plea that a demand was made by the landlord for permission to enter the premises for the purpose of seizing the goods. The necessity of breaking open the door of the house might thus have been avoided. The power of entering a dwelling-house, for the purpose of seizing goods which have been deposited there by a stranger, is one which may work injustice. The statute, no doubt, does not contain any provision by which a demand is expressly required; but if it is capable of being construed in favor of this position, it ought to receive such an interpretation. *Harper v. Carr*, 7 T. R. 270.

Willes, contra. First, as to the objection that the plea is bad by reason of its omitting to state that the plaintiff participated in the act of the tenant, and in support of which position several cases are cited in which such an averment has been introduced into the plea; the answer is, that the statute does not require such an averment. The third section imposes a distinct penalty upon the tenant who fraudulently removes his goods; and in case of a third party wilfully aiding the tenant, it imposes upon him a like penalty. But the enactments of the statute give the landlord the power of following the goods upon the premises of any person, whether he participate or not with the tenant in the fraud upon his landlord.

Secondly, it is said that there ought to have been a demand of admittance. But the statute contains no provision whatever which requires a demand to be made. The 7th section enacts, that it shall be lawful, "in the case of a dwelling-house, oath being first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein, in the daytime to break open and enter into such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels, for the said arrears of rent, as he, she, or they might have done, by virtue of this or any former act, if such goods and chattels had been put in any

open field or place." It may be admitted that a sheriff, in order to execute process of the law upon the defendant, or his property removed there to avoid an execution, must demand admittance before he can lawfully break the outer door of a dwelling-house. *Ratcliffe v. Burton*, 3 Bos. & P. 229; *Hutchinson v. Birch*, 4 Taunt. 627. But in the present case, the steps which are to be taken in making the distress are expressly pointed out by the statute.

[PARKE, B. Suppose goods are placed upon a person's land without his privity, can the landlord follow the goods and enter the premises by violence for that purpose, without having first requested permission to do so?]

He may under this statute. In Viner's Abridgement, tit. "Trespass" (I. a.), it is said, "If a man takes my goods and carries them into his own land, I may justify my entry unto the said land to take my goods again; for they came there by his own act." *Patrick v. Colerick*, 3 M. & W. 483, is to the same effect.

[PARKE, B. A trespasser may be followed upon his own land, but the difficulty which presses me is, whether the statute gives the power of going upon the land of an innocent party. What remedy would the party have?]

If he has taken no share in the transaction, his remedy will be against the party who deposits the goods upon his property.

Thirdly; it is said that the plea ought to have shown that the plaintiff was not a *bonâ fide* purchaser for a valuable consideration, within the second section of the act. But if the plea had contained such a statement, it would have amounted to an argumentative denial of the goods being the plaintiff's. The second section comes by way of proviso, and the plaintiff, if he can bring his case within it, ought to make it the subject of a replication. *Thibault v. Gibson*, 12 M. & W. 88; *Washbourn v. Burroughs*, 1 Exch. 107; *Upton v. Bassett*, Cro. Eliz. 445.

Lastly, the plea is good in form, for it does not amount to an argumentative traverse of the goods being the plaintiff's. If the plaintiff became the owner of the goods by way of gift, the second section does not apply. The plea, therefore, sufficiently admits that, at the time of the seizure, the goods were the plaintiff's. The defendant could not have availed himself of the defence set up in the fourth plea, under a traverse of the goods being the plaintiff's. The property in the goods is not changed by the distress. *Samuel v. Duke*, 3 M. & W. 622. The plea does not require express color. *Doctor Leyfield's case*, 9 Rep. 405.

Cowling was heard in reply.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. This case was argued before my lord chief baron and my brothers *Alderson*, *Martin*, and myself, at the sittings in last term. The declaration was in trespass. [His lordship, after stating

the pleadings, proceeded:] This plea admits that the goods were, at the time of the seizure, the goods of the plaintiff, as averred in the declaration, but justifies that seizure on the ground that the same goods had been, within thirty days before, fraudulently carried off by the tenant, being his own goods, from the demised premises, to prevent a distress for rent, and locked up on the plaintiff's close; and it avers the locks to have been broken in the presence of a constable.

The question on general demurrer is, whether this plea states a good *prima facie* case within the enactment of the 11 Geo. 2, c. 19, s. 1. We think it does. If goods of the tenant are fraudulently conveyed away, they are by that section made liable to a distress within the period of thirty days, to whatever place removed. By the general terms of the section, liability attaches to the particular goods themselves, not merely so long as they continue the goods of the tenant; and then the next section, which states by way of proviso that no landlord shall take or seize goods as a distress, which have been *bona fide* sold for a valuable consideration to persons not privy to the fraud, operates as a defeasance of the provisions of the former section, and takes all goods so sold out of its operation. If the plaintiff fell within that category, he ought to have so replied, according to the rules of pleading. And a reason for this enactment being made in the shape of a proviso is, that the plaintiff knows his title to the goods better than the landlord; and the defendant ought not to be called upon to plead as part of his justification that they were not so sold. In the absence of such a replication, the plaintiff must be taken to have been either merely in possession of the goods, or a bailee, or to have been a donee without value; and therefore the liability of those goods to distress still continued.

But it was then contended, that the plaintiff's close could not be entered, and, still more, his locks could not be broken, unless he was a party to or at least consant of the fraudulent removal of the goods; for it would, it was said, be a hardship on him if innocent, and if the goods were locked up without his privity or knowledge in his close, that his locks should be broken; and further, that it could not be a justifiable act to break open his gates without a previous request to open them; and though the statute in express words requires neither one circumstance nor the other, one or both must, by implication, be deemed necessary, on the plain principles of justice.

We do not think that either of these circumstances were necessary conditions to the exercise of the right given by the statute. According to the ordinary construction of the words, they are not requisite, nor are they, we think, implied. Though, in some cases, it might be just to require both circumstances, in the great majority which occur it would not be so; for, generally, goods fraudulently removed are not secreted in a man's close or house without his privity or consent. The legislature may be presumed to have had this in their contemplation: *ad ea quæ frequentius accidunt jura adaptantur*. The remedy against the fraud of the tenant given by the act is a stringent one, and meant to be operative; and if it were made a condition to the exercise of this power, that the landlord should prove the privity

Thomas v. Watkins.

of the person in possession of the goods, it might be very difficult to do so, or to ascertain that within the period allowed to distrain; and then the remedy would be of little value. Again, if the gate of a field could not be broken open without a previous request to open it, it may easily be conceived that a great impediment would be interposed, by the necessity of searching for and finding the occupier in order to make a request; and as it rarely happens that the occupier of the field would be innocent, the statutory provision is by no means on the whole unjust; and the presence of the peace officer is a protection against any excess. Besides, if the plaintiff were really innocent of all collusion with the fraudulent tenant or person placing the goods on his close, he would have a remedy against that person for the damage sustained by the act of the landlord. We think therefore that the plea is good on general demurrer.

The grounds of special demurrer are also insisted on. The first ground is, that the statement that the goods were those of the tenant is inconsistent with the allegation in the declaration, that they were the plaintiff's, and so an argumentative traverse; and if the plea admits the goods to be the plaintiff's, then the right to distrain did not exist, because it applies only to cases in which the tenant removes his own goods. But this is a misapprehension. The plea admits the goods to be the plaintiff's at the time of seizure, and avers that they were the tenant's at the time of removal, in which there is no inconsistency whatever. Both may be perfectly true. There is, therefore, no such dilemma as suggested in the special demurrer.

From some passages in the judgment of Lord Denman, in the Queen's Bench, in *Fletcher v. Marillier*, 9 Ad. & E. 461 (if the report be correct), it would appear, that the difference between the time of removal and of seizure was not adverted to; but the case itself is distinguishable, as the plea admitted the goods at the time of seizure to be the property of and in the possession of the tenant, and no color of title was given to the plaintiff; and that is pointed out as a cause of special demurrer, and also relied upon in the judgment. Our judgment is therefore for the defendant.

*Judgment for the defendant.*¹

THOMAS v. WATKINS.²

April 26, 1852.

Landlord and Tenant — Pleading

To an action of trespass for breaking and entering the plaintiff's house and seizing his goods, the defendant pleaded that one Thomas held a house as tenant to one Payne, at a

¹ See the following case.

² 7 Exchequer Rep. 630.

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certain rent; that the rent was in arrear; that the said goods, being the goods of Thomas, were fraudulently and clandestinely conveyed by him from his house to prevent a distress, and were, with the plaintiff's consent, placed in the plaintiff's house; whereupon the defendant, as bailiff of Payne, and by his command, seized the goods as a distress.

Replication, that the said goods were not the goods of Thomas, nor were they fraudulently and clandestinely conveyed away by Thomas to prevent a distress:—

Semble, that the replication was not open to the objection of multifariousness, but that it was a good answer to the plea.

TRESPASS for breaking and entering the dwelling-house of the plaintiff, and for seizing his goods.

Plea, under the 11 Geo. 2, c. 19, that one E. Thomas held a certain house as tenant to one Payne, at the yearly rent of 65*l.*; that the rent was due and in arrear from Thomas to Payne; that the said goods, being the goods of Thomas, were fraudulently and clandestinely conveyed away by him from his said dwelling house, to prevent Payne from distraining them, and were, with the consent and privity of the plaintiff, placed in the plaintiff's dwelling-house; whereupon the defendant, as the bailiff of Thomas, and by his command, seized the said goods as a distress.—Verification.

Replication, that the said goods were not the goods of Thomas, nor were they fraudulently and clandestinely conveyed away by Thomas to prevent a distress.

Special demurrer, assigning for causes, that the replication was bad, as being double and multifarious.—Joinder in demurrer.

Willes, in support of the demurrer. The replication is bad for the reasons assigned. If the plaintiff had traversed either allegation, and the defendant, on the trial, were to fail in the proof of the allegation so traversed, the plea would not be supported. The replication is therefore double.

Prideaux, contra. The plaintiff might have replied *de injuriâ* to this plea, as is clear from the case of *Bowler v. Nicholson*, 12 A. & E. 341. There the plaintiff himself was the tenant, and the replication was held insufficient, on the ground that the plea alleged an authority given by law, which was explained by Patteson, J., to mean an authority which must be mediately or immediately derived from the plaintiff. In the present case, the relationship of landlord and tenant does not exist between the plaintiff and the defendant. These parties are mere strangers. Now the replication *de injuriâ* would have put in issue all the material allegations in the plea. The plaintiff is, therefore, at liberty to traverse any one or more of the material allegations. *Garten v. Robinson*, 2 Dowl. P. C., N. S., 41.

[MARTIN, B. When a particular formula is given, can the pleader depart from it? In *Sutherland v. Pratt*, 11 M. & W. 206, it was held that a defendant cannot separately traverse an allegation which would be put in issue by a plea of the general issue.]

In *Chadwick v. Herapath*, 3 C. B. 885, it was held, that where a plaintiff may reply generally, denying the whole of a plea, he is at liberty to deny any part of it.

Landman v. Entwistle.

[PARKE, B. The defendant had better withdraw his demurrer, and join issue upon the replication.]

POLLOCK, C. B. The inclination of the opinion of the court is in favor of the replication.]

Willes elected to amend on the usual terms.

LANDMAN v. ENTWISTLE.¹

May 1, 1852.

Railway Company — Engineer — Provisional Committee — Contract to pay out of Funds of Company.

In an action by an engineer against a provisional committeeman of a railway company, it appeared that, at a meeting of the committee, at which the plaintiff was present, it was resolved, "that the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the company, and that no such responsibility shall attach to them." At another meeting, at which the plaintiff was also present, a resolution was passed, which contained a statement that the plaintiff had said "that he would make no claim for his services until there should be sufficient funds of the company to meet any demand he might be entitled to make." The plaintiff stated in a letter, that "he never understood that, unless the project were successful, the engineers were to abandon all claim; but he did understand, that the individuals comprising the committee were not to be held personally liable." At a subsequent meeting of the committee, it was resolved, "that the committee bind themselves to be answerable to the extent of 1,000*l.*, to be applied to engineering and surveying purposes." The scheme was abandoned, and deposits to the amount of 4,168*l.*, which had been received by the committee, were returned to the shareholders: —

Held, that the defendant was not responsible, the contract being that the plaintiff should be paid out of such funds as could be properly applied in satisfaction of his claim, and there were no funds of that description.

ASSUMPSIT for work and labor, &c. Plea, *non assumpsit*.

At the trial, before Pollock, C. B., at the Middlesex sittings after last Hilary term, it appeared that the action was brought to recover the sum of 616*l.* 18*s.* 4*d.*, claimed by the plaintiff for his services as the engineer of a projected railway company, called the Kentish Railway Company, of which the defendant was one of the provisional committee. On the part of the plaintiff the following documentary evidence was adduced. On the 7th of October, 1844, the plaintiff wrote to the secretary of the company as follows: — "Having now made all the necessary trials, sections, and inspections of the country along the line between Gravesend and the proposed western terminus, I think it desirable that no time should be lost in calling a meeting of the committee, in order that they may adopt the necessary measures for providing the funds indispensably required for carrying on the final surveys, and completing the parliamentary documents."

¹ 7 Exchequer Rep. 632.

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At a meeting of the committee of management on the 17th of October, 1844, at which the plaintiff was present, it was "Resolved, that Messrs. Lake & Co. be requested to forward the survey in such manner as may be found advisable, Colonel Landman (the plaintiff) stating that he would render every assistance in his power, and that he would make no claim for his personal services, or for those of his assistant, Mr. Pinhorn, until there should be sufficient funds of the company to meet any demand he might be entitled to make."

At a meeting of the committee of management on the 29th of October, 1844, one of the resolutions was as follows: "And it appearing to the committee that it is absolutely necessary to provide a fund, in order that the surveys of the line may be immediately proceeded with, it was (on the motion of Mr. Entwistle) — Resolved, that the committee bind themselves to be answerable to the extent of 1,000*l.*, to be applied to engineering and surveying purposes."

At a meeting of the committee of management on the 18th of November, 1844, after stating that negotiations had been entered into with the South Eastern Railway Company, to carry into effect the projected Kentish Railway, it was resolved, "That, having now an assurance from the South Eastern Railway Company that they will endeavor to obtain the authority of parliament, and that, if authorized by parliament, they will construct a line of railway through North Kent to Canterbury, similar in its general course to that proposed by this company; and having an engagement from them to reimburse to this committee the expenses hitherto incurred, this committee are of opinion that it is expedient that the Kentish Railway Company should withdraw from this undertaking in favor of the South Eastern Railway Company."

At a meeting of the provisional committee on the 28th of November, 1844, at which the defendant was present, one of the resolutions was "That B. Greene, J. Blyth, John Entwistle (the defendant), the trustees for this company, be a committee for determining and settling the liabilities of this company, and for receiving from the South Eastern Railway Company, under the arrangement entered into with them, the money requisite for discharging such liabilities."

On the 18th of November, 1844, the solicitors of the Kentish Railway Company wrote to the plaintiff as follows — "We are desired by the committee of management to inform you that they have made arrangements, by means of which their projected line of railways through North Kent to Canterbury will be executed by the South Eastern Railway Company, and to request that you will furnish them, as early as possible, with a statement of the expenses incurred on the authority of the committee in reference to the Kentish Railway."

On the part of the defendant, the following documents were given in evidence: — At a meeting of the provisional committee on the 12th of August, 1844, to which the defendant was a party, and at which the plaintiff was present, one of the resolutions was, "That the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred, or to be incurred, in or about the company, and that no such responsibility shall attach to

them." Another of the resolutions at the same meeting was, "That it be a recommendation to the committee of management to endeavor to secure the valuable services of J. Locke, Esq., the eminent engineer, in addition to those of Colonel Landman, the original projector of the railway, it being clearly understood that neither of those gentlemen shall have any personal claim against any member of the provisional committee."

On the 9th of October, 1844, the solicitors of the company wrote to the plaintiff, inquiring whether the survey of the line was not included in his "engagement to the committee not to make any charge unless the project succeeded;" and on the 11th of October, the plaintiff wrote in answer: "I never understood that, unless the project were successful, the engineers were to abandon all claim; but I did understand that the individuals comprising the committee were not to be held personally liable. I am perfectly ready to continue to devote my time and attention to the perfecting of the survey, and getting up of the parliamentary documents, without making any charge for the same until sufficient funds may have been collected."

The scheme was abandoned in pursuance of the arrangement entered into with the South Eastern Railway Company, and the deposits on shares, which amounted to 4,168*l.*, were returned to the subscribers. It was submitted on the part of the defendant, that, under the above circumstances, he was not liable, inasmuch as the contract was that the plaintiff should be paid out of the profits of the undertaking. The learned judge, being of that opinion, directed a nonsuit, reserving leave for the plaintiff to enter a verdict for him, if the court should be of opinion that he was entitled to recover.

A rule *nisi* having been obtained accordingly,

The *Attorney-General* (*Hoggins* and *Smythies* with him), showed cause. The plaintiff was cognizant of the resolutions of the 12th of August, 1844, and consented to act on those terms; consequently he has no remedy against the individual members of the provisional committee. It will probably be argued, that the deposits on shares were intended to form a fund available for all necessary expenses, and that the charges for engineering are of that description. But it is clear that the deposits were not a fund out of which the plaintiff was ultimately to be paid. They were intended to provide for petty cash expenses, necessarily incident to the promotion of the scheme, and were never designed to include heavy charges, such as those of the surveyor or engineer. The shareholders were entitled to have their deposits returned as soon as the undertaking was abandoned; *Ashpitel v. Sercombe*, 5 Exch. 147; therefore there was no fund available for the plaintiff's claim. The letter of the 18th of November, in which the solicitors of the company request the plaintiff to furnish them "with a statement of the expenses incurred on the authority of the committee," cannot create any liability when none previously existed. *Higgins v. Hopkins*, 3 Exch. 163, is distinguishable; for in that case there was no agreement that the acting committee should not be responsible; and it was a question for the jury, whether, under the

circumstances, the plaintiff and defendant meant to contract on the footing of a personal liability of the defendant, either alone or as a member of the acting committee, or on the credit of the funds. Here there is an express stipulation that the provisional committee shall not be personally liable, and the contract, which is merely conditional, to pay out of the funds, was never rendered absolute by the receipt of funds.

[PARKE, B. The term "funds" does not mean "deposits," but the funds of the company when formed.]

The court then called on

A. Cockburn, Bramwell, and Wilkinson, to support the rule. The question is, what was the contract between the parties; and that is to be collected from the correspondence and the resolutions of the committee. The resolution of the 12th of August, in which the committee "disclaim the intention of taking on themselves any personal responsibility," is explained by the resolution of the 17th of October, in which the plaintiff says that he will make no claim "until there should be sufficient funds of the company to meet any demand he might be entitled to make." He never intended to release the committee from all obligation, but only that they should not be personally responsible if there were funds to satisfy his claim. That such was the plaintiff's meaning is evident from his letter of the 11th of October, in which he says, "I never understood, that, unless the project was successful, the engineers were to abandon all claim; but I did understand that the individuals comprising the committee were not to be held personally liable." According to the true construction of these documents, the meaning of the parties was, that the provisional committee should not be liable at all events, but that as soon as sufficient funds were collected the plaintiff should be entitled to enforce his claim. The right to payment was not to be contingent on the final completion of the company, but only on sufficient funds being obtained. Then, were there available funds? It is submitted that there were. The plaintiff was not bound to consider the liabilities of the provisional committee to the shareholders in respect of deposits, but immediately funds came to their hands they were liable to pay.

PARKE, B. The rule must be discharged. It is clear that the plaintiff undertook to do the work, not upon a contract with the provisional committee, but looking to the chance of the scheme succeeding, and of there being funds available for the payment of his claim. The plaintiff's letter, of the 11th of October, shows that there was no contract on the part of the provisional committee, that he should be paid at all events. In the majority of cases of this kind, the contract is that the party shall look only to the funds of the company, and not to the responsibility of the individuals who manage it.

PLATT, B. I am of the same opinion. This action cannot be maintained, unless there was a personal responsibility on the part of

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the defendant to pay the plaintiff. But, by the resolution of the 12th of August, the provisional committee distinctly repudiate any personal liability; and it appears from the resolution of the 17th of October, that the plaintiff agreed to make no claim for his services "until there should be sufficient funds of the company to meet any demand he might be entitled to make." That must surely mean sufficient funds of that description which the committee could properly apply in satisfaction of the plaintiff's claim. Now, the sum of 4,168*l.*, which consisted of deposits, was not a fund of that description; for, on the abandonment of the scheme, all the depositors were entitled to call for repayment of their deposits, the consideration upon which their duty to pay was founded being at an end. The sum in question, therefore, was not available in satisfaction of the plaintiff's demand, and there were no funds out of which he was entitled to be paid.

MARTIN, B. I am of the same opinion. The case has been put to us much in the same way that a counsel puts a case to a jury. He tells them that the plaintiff has done the work, and that he is entitled to be paid for it; and laying aside the documents upon which the contract is founded, he calls upon the jury, and frequently with success, to infer a contract which renders the defendant liable. The answer is, that the true contract between the parties must be looked at for the purpose of ascertaining with whom the liability rests. Now, in this case, was there any obligation on the part of the provisional committee to go on with the scheme? There certainly was not. They were at liberty in that respect to act as they pleased, and the engineer had no right to compel them to go on. He took the chance of payment provided the scheme succeeded, in which case he would, no doubt, have been paid out of the profits.

POLLOCK, C. B. I agree with the rest of the court that there is no foundation for setting aside the nonsuit.

Rule discharged.

HUMPHREYS and another v. PEARCE.¹

April 22, 1852.

Arbitration — When Award Good though no Specific Finding on Each Issue.

Where matters in difference in a cause involving several issues are referred to arbitration, the costs of the cause to abide the event, the award is good notwithstanding there is no specific

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finding on each issue, if it appear by necessary intendment that the arbitrator has disposed of all the issues:—

Semle, that it is otherwise, where the reference is of the cause and also of matters in difference.

THIS was an action of debt, to recover the sum of 149*l.* 17*s.* 6*d.* for the keep of horses, standing of carriages, &c. The declaration contained several *indebitatus* counts, to which the defendant pleaded, first, except as to 42*l.*, never indebted; secondly, except as to 42*l.* a set-off; thirdly, except as to 42*l.* payment; fourthly, as to 42*l.*, payment of 42*l.* 1*s.* into court, and no damages *ultra*. The plaintiffs took the money out of court, and denied the set-off and payment. After issues joined, all matters in difference in the cause were referred to an arbitrator, the costs of the cause and of the reference and award to abide the event. The arbitrator awarded *de præmissis* as follows: "I do award and order that the said J. Pearce shall and do pay or cause to be paid to the said R. Humphreys and I. Humphreys the sum of 84*l.* 14*s.* 2*d.* over and above the sum of 42*l.* paid into court by the said J. Pearce; which I do adjudge and award to be due from the said J. Pearce to the said R. Humphreys and J. Humphreys, for and upon the matters in difference to me referred as aforesaid."

G. Atkinson moved to set aside the award, on the ground that it was not final. The arbitrator ought to have found specifically on each issue. It is consistent with this general finding, that the arbitrator has considered only the causes of action mentioned in the declaration, without reference to the defendant's claim by way of set-off. There should have been a distinct finding on that issue, so as to enable the plaintiffs, if necessary, to plead it in bar to a cross action for the subject-matter of the set-off. It is also consistent with this award that the defendant proved the plea of payment, which would entitle him to the costs of the issue.

[*PARKE, B.* The sum is awarded to be due in respect of all the matters referred. If the reference had been of "all matters in difference between the parties to the cause," there would be ground for arguing that the award was bad; for the sum might have been awarded in respect of matters in difference only.]

In *Kilburn v. Kilburn*, 13 M. & W. 671, where the declaration contained several counts, it was held, that *non assumpsit* raised a distinct issue upon each count, which the arbitrator was bound to decide.

[*PARKE, B.* That was a reference of the cause and also of all matters in difference; and the arbitrator merely awarded that the defendant was indebted to the plaintiff in a certain sum; but whether that was the sum for which the action was brought, or whether it was a matter in difference *ultra* the action, did not appear; so that there was no means of taxing the costs of the action. Here the arbitrator finds that the plaintiffs are entitled to a certain sum upon all the causes of action.]

Brooks v. Parsons, 1 D. & L. 691, was a reference of the cause only; and *Patteson, J.*, held, that "the direction to an arbitrator to

find a verdict, meant that he must find one according to law; that is, specifically upon each issue."

[MARTIN, B. In Russell on Arbitration, p. 348, it is said, "In one case, *Cooper v. Langdon*, 9 M. & W. 60, where there were several special inconsistent pleas, the court treated the awarding a general verdict for the defendant as a finding on all the issues in his favor; and in a very recent case, Parke, B., said, that awarding a general verdict for the plaintiff means a verdict on all the issues. *Dresser v. Stansfield*, 14 M. & W. 822. The distinction is, where the reference is of the cause only, and where it is of the cause and also of matters in difference."]

POLLOCK, C. B. There will be no rule. In my opinion, some of the cases on this point cannot be sustained. The correct principle is, that, if there be a reference of a cause involving several issues, and it can be discovered upon the award that every issue must have been considered by the arbitrator, that is sufficient, without a specific finding on each. Therefore, if an arbitrator, as here, directs that, upon the whole matters in difference in the action, the plaintiff is entitled to a certain sum, that disposes of all the issues.

PARKE, B. In this case, by necessary intendment, there is a finding upon every issue; for the arbitrator awards that 84*l.* 14*s.* 2*d.* is due in respect of the matters referred, over and above the 42*l.* paid into court. That disposes of the issues on the pleas of payment and set-off; for if the defendant had proved a set-off and payment beyond the 42*l.*, the arbitrator could not have found that 84*l.* 14*s.* 2*d.* was due. The set-off is only material as a matter in difference in the cause; and the question, whether the defendant had a set-off, will depend upon the sum which is awarded to the plaintiffs; therefore, the arbitrator must have found both the pleas in the negative, for otherwise the plaintiffs could not be entitled to 84*l.* 14*s.* 2*d.* beyond the sum paid into court. It is enough to say that it appears, by necessary intendment, that all the issues are disposed of. I am inclined to think that the case *Brooks v. Parsons* would not have been decided by my brother Patteson in the same manner at the present day.

MARTIN, B. I am of the same opinion. *Brooks v. Parsons* was decided in the year 1843, and may now be considered as overruled by no less than three cases. There is *Wilcox v. Wilcox*, 4 Exch. 501, in this court, which adopts the principle of the decision of my brother Earle in *Hobson v. Stewart*, 4 D. & L. 589; and there is the case of *Phillips v. Higgins*, 2 L. M. & P. 355, in which my brother Wightman expressed his opinion, that, where there is a reference of a cause only, the award is good, notwithstanding there is no specific finding on each issue, if it appear by reasonable intendment that the arbitrator has determined all the issues in the plaintiff's favor. I am glad it has been so decided, because it is clear that, when an arbitra-

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tor finds that the plaintiff is entitled to a certain sum, he must mean "upon all the issues joined in the cause."

Rule refused.

CROUCH v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.¹

April 28, 1852.

Carriers — Notice of Limited Responsibility — Pleading — Argumentative Denial of Bailment.

To an action on the case, in which the declaration stated that the defendants were common-carriers, and that they received from the plaintiff, as such common-carriers, a certain package, to be safely carried and to be delivered for him at a place mentioned, and that the defendants did not safely carry the package, but that through their negligence it was lost; the defendants pleaded that, at the time they received the package, they gave the plaintiff notice that they would not be responsible for packages of a particular description, under which this particular package fell, unless their contents were declared; and that the contents of this package were not declared; and that the defendants did not consent to be responsible contrary to the terms of such notice. Verification:—

Held, that the plea amounted to an argumentative denial of the bailment as alleged in the declaration.

CASE. The first count of the declaration stated, that the defendants were common-carriers of goods for hire, from Liverpool to Dublin; and that the plaintiff, on &c., caused to be delivered to the defendants, as such common-carriers as aforesaid, and the defendants, as such common-carriers, received, a package containing divers goods, to wit, &c., to be safely and securely carried and conveyed by the defendants for the plaintiff, from London to Dublin, and at the said last-mentioned place to be delivered by the defendants for the plaintiff, within a reasonable time in that behalf; and that it thereupon became the duty of the defendants safely and securely to carry and keep the package. Breach, that the defendants did not safely and securely carry the package; but that, through their negligence, the package and its contents were lost.

Plea, that, at the time when &c., the defendants gave notice to the plaintiff that they would not carry any package containing several packages collected from different parties, and addressed to and intended for several different parties, although inclosed in one package and addressed to one party, unless the addresses on the inclosed packages and their contents were declared; and further, that the defendants would not be responsible for any such package or the contents, unless such declaration should be made, and the particulars declared; and that the defendants carried on their business on the terms contained in the said notice; that the package inclosed three parcels, received by the plaintiff from three different parties; and the

¹ 7 Exchequer Rep. 705.

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parcels were addressed to and intended for three different parties; and that the fact that the package contained such parcels was not declared to the defendants; and that the defendants received the package on the terms of the notice, which the plaintiff well knew; and that the defendants never consented to subject themselves to any responsibility contrary to the terms of the said notice. Verification.

Special demurrer, assigning, amongst other causes, that the plea denied argumentatively that the package was delivered to and received by the defendants as common-carriers. Joinder in demurrer.

J. Brown, in support of the demurrer, contended that the plea clearly amounted to an argumentative traverse of the bailment as stated in the declaration; and he cited *Shaw v. York and North Midland Railway Company*, 13 Q. B. 347, to show that, where such an alleged bailment was traversed, and it having been proved at the trial that the chattel bailed was made subject to a condition not complied with, it was held that the allegation was not sustained; that in *Wyld v. Pickford*, 8 M. & W. 443, the notice differed from that in the present case; and that, although the objection was taken to a plea of its being argumentative, the objection was held to be answered by the fact, that the defendants there did not by the terms of their notice stipulate to carry goods of any description unless insured. He also relied upon *Austin v. Manchester, Sheffield, &c. Railway Company*, 20 Law J. Rep. (N. S.) Q. B., 440; s. c. 5 Eng. Rep. 329, as being in point. The court then called upon

Atherton to support the plea; and he endeavored to distinguish the case from that of *Shaw v. York and North Midland Railway Company*. But

The Court were most clearly of opinion, that the objection to the plea was good, and that the plaintiff was entitled to judgment.

Judgment for the plaintiff.

BURTON v. WHITE and another.

April 26, 1852.

Devise — Estate — Local Description — Fee Simple.

A testator by his will (made before the passing of the 7 Will. 4, & 1 Vict. c. 26), devised as follows:—"I give and bequeathe to my son J. W. all that farm or estate I bought of Mr.

 Burton v. White.

B., of London, containing about twenty acres, situate at the Quinton, in the parish of H., in the county of S., and in the occupation of myself, my son G. W., and W. J. :—

Held, that the son took an estate in fee-simple in the property.

THIS was a special case, directed by a decree of Vice-Chancellor Knight Bruce, made in a suit in which William Burton was plaintiff, and John White and Sally Powers were defendants, for the opinion of this court upon the following devise, contained in the will of Aaron White, dated the 17th day of July, 1820.

The testator, by his said will, which was duly executed as by law was then required for the devise of freehold estates (amongst other things), devised as follows :—“ I give and bequeathe to my son, John White, all that farm or estate I bought of Mr. Bradley, of London, containing about 20 acres, situate at the Quinton, in the parish of Hales Owen, in the county of Salop, and in the occupation of myself, my son George White, William Read, Benjamin Yates, and William Jones.”

The testator, at the date of his will, and at the time of his death, was seised in fee-simple in possession of the property mentioned in the above devise, the fee-simple of which he had purchased of the said Mr. Bradley, and he continued seised thereof to the time of his death (which took place on the 23d of May, 1822), without having altered or revoked his said will.

The question for the opinion of the court was, what estate the said John White took in the property in the said will of the said testator, described as &c.

Phipson for the plaintiff. It is submitted on the part of the plaintiff, that the devise in question does not operate to pass a fee in the property therein mentioned ; but that John White took an estate for life only. The word “ estate,” which is to be found in this clause, has reference merely to the local description of the property. The words used are not “ all my estate,” but “ all that farm or estate.”

[PARKE, B. It means all that estate which became mine by purchase. I think you will have some difficulty in distinguishing this case from that of *Gardner v. Harding*, 3 Moore, 565, where the words of the will were, “ I bequeathe to my brother my freehold estate, consisting of thirty acres of land, more or less, with the dwelling-house, and all erections on the said farm, situate at S., in the county of M., now in the occupation of J. G. ;” and, although the words there were strongly descriptive of the *corpus* of the property, still they were held to pass an estate in fee-simple.

MARTIN, B. We lately had a similar case in this court, of *Doe d. Pottow v. Fricker*, 6 Exch. 510 ; s. c. 5 Eng. Rep. 443, in which a like decision was come to.]

The case first referred to may be distinguishable, on the ground that the word “ my ” is there used instead of “ that.” If the words here had been “ all that estate ” I bought of Mr. B., it may be conceded they would have passed the fee. *Bailis v. Gale*, 2 Ves. sen. 48. But the word estate is clearly used as synonymous with “ farm,” which is not intended to describe the interest of the testator, but merely the locality of the property.

[PARKE, B., referred to *Roe d. Child v. Wright*, 7 East, 259.]

In *Doe d. Clarke v. Clarke*, 1 Cr. & M. 39, the word "property" was held not to have such an effect. *Doe d. Norris v. Tucker*, 3 B. & Ad. 473, is in the plaintiff's favor, and *Doe d. Lean v. Lean*, 1 Q. B. 229, very strongly so. And in *Doe d. Burton v. White*, 1 Exch. 526, it was held that the word "estate" did not necessarily pass the fee.

Karslake appeared for the defendant White, and *Hayes* for the other defendant, but they were not called upon by the Court.

POLLOCK, C. B. I am clearly of opinion that John White took an interest in fee-simple in the property mentioned in this clause of the will. It is not necessary to give an elaborate judgment. Although this will was made before the passing of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, I am not by any means disposed for that reason to put a different construction upon the words here used. The word "estate" has so far a technical meaning as to pass the fee, and the court will give it that effect if they are of opinion that such was the testator's intention. And I am clearly of opinion that the word "estate" was so used here by the testator. I agree with an observation which fell from my Brother Martin in the course of the argument, that although it may be difficult to reconcile all the cases upon this point, there is no necessity to do so here. I am glad that I am not unable to give an opinion which is agreeable to the intention of the testator. I therefore think that we ought to certify to the Vice-Chancellor that the party in question took the fee-simple.

PARKE, B. I am of the same opinion. It is very desirable that effect, if possible, should be given to every word which a testator has used. Now the word "estate" is sufficient to pass the whole interest a testator has in the subject-matter, unless it be controlled by other words in the will, so as to require it to be considered as merely descriptive of the corpus of the property disposed of by the will. In *Gardner v. Harding*, 3 Moore, 565, the words of the will were held to pass an estate in fee-simple; and that case is hardly distinguishable from this, only that here the word "farm" is introduced in conjunction with the word "estate." So in *Roe d. Child v. Wright*, 7 East, 259, the words "all my estate, lands, &c., known and called by the name of the Coal Yard, in the parish of St. Giles, London," carried the fee, there being no other words which restrained them, so as to require the term "estate" to be construed as descriptive of locality only. The mere position of the words, without anything else, makes no difference. I do not think it possible to distinguish this case from those where the word "my" is to be found. The language here is equivalent to that. The courts are not in the habit of neglecting, if possible, to give full effect to any word used, and I am clearly of opinion that the testator here intended to pass his whole interest in this land.

 Ward v. Broomhead.

PLATT, B., concurred.

MARTIN, B. I am also of the same opinion. I think it is not necessary to refer to the cases upon this subject, as it is perfectly clear that the testator intended to give all his interest in this property to John White. Therefore the fee passes under this will.

Certificate accordingly.

WARD v. BROOMHEAD and another.¹

May 8, 1852.

Judgment—Execution—Discharge of Judgment Debtor—Action on Judgment—Entry of Satisfaction on Roll.

The plaintiff having recovered judgment in an action against two defendants, issued two concurrent writs of *ca. sa.* thereon, and the defendants were taken in execution, but were discharged by the plaintiff's attorney, upon their making an arrangement for the payment of the debt. The plaintiff afterwards issued a writ of *fi. fa.* for the balance of the original debt, and the goods of one of the defendants were seized; but, upon payment of a certain sum under protest, the goods were released. A rule *nisi* was afterwards obtained by the defendant to procure a return of this money, on the ground that the original debt was barred by the defendants' discharge out of custody, as having been made either by the authority of, or as having been ratified by the plaintiff. The Court referred the matter to the Master to report thereon to the Court; and he found that the discharge of the defendants had been ratified by the plaintiff: and therefore, the Court made the rule to set aside the execution absolute. The plaintiff then brought an action upon the original judgment. The Court, under the preceding circumstances, refused to order satisfaction to be entered up on the judgment-roll in the action.

THIS was a rule calling upon the plaintiff to show cause why satisfaction should not be entered on the judgment-roll in this action, and the signature of the plaintiff to the satisfaction-piece dispensed with. It appeared by the affidavits, that the plaintiff, having obtained judgment against the defendants in 1844, issued two concurrent writs of *ca. sa.* against them, under which both defendants were taken in execution, and that they were subsequently discharged by the plaintiff's attorney, on their making arrangements for the payment of a portion of the debt. In October, 1851, the goods of the defendant, J. Broomhead, were seized under a writ of *fi. fa.* at the suit of the plaintiff, for the balance of the original debt; and 112*l.* having been paid by the defendants under protest, the goods were released. A rule was afterwards obtained, calling on the plaintiff to show cause why the execution should not be set aside, and the 112*l.* repaid to the defendants, on the ground that the debt was barred by reason of the discharges of the defendants out of custody, in 1844, having taken place by the

¹ 7 Exchequer Rep. 726.

Ward v. Broomhead.

authority or with the ratification of the plaintiff. On the case coming on for argument, it was ordered by the court that the said sum of 112*l.* should be paid into court, to abide the further order of the court; and as to the residue of the rule, it was ordered that the same should be referred to the Master to consider, and report his opinion thereon to the court, with liberty to receive further evidence, to examine witnesses, &c. The Master reported that the plaintiff, subsequently to the said discharges, had ratified and confirmed the same; whereupon the rule for setting aside the execution, and repaying the 112*l.* to the defendants, was made absolute. The plaintiff thereupon brought an action on the judgment, and having refused to sign the satisfaction-piece, when requested by the defendants so to do, the present rule was obtained; against which

Lush and *Quain* showed cause. The defendants are not entitled to enter satisfaction on the roll in this case, where no satisfaction has been in fact given. If the defendants wish to rely upon the fact that they were discharged out of custody by the authority of the plaintiff, they may plead that defence as an answer to the action upon the judgment. *Vigers v. Aldrich*, 4 Burr. 2482. If these defendants were to bring an action of trespass against the present plaintiff, and were to recover damages against him to a less amount than for that of the judgment, the plaintiff would be allowed to enter satisfaction upon the judgment-roll. *Simpson v. Hanley*, 1 M. & Selw. 696. The matter of fact, whether the discharge of the defendants was effected by the authority of the plaintiff, is a proper question for a jury. The parties are not concluded by the Master's report. The court then called upon.

Cleasby, in support of the rule. The matter was referred to the Master, and he has specifically found that the plaintiff did ratify that act. That step was immaterial, if this question is allowed to go before a jury. *Blanchard v. Cawthorne*, 4 Sim. 566.

[PARKE, B. I am sufficiently acquainted with the facts of this case to feel assured that the question, whether the plaintiff ever ratified that act, is a very nice one. He is not bound unless that was so, and he is not precluded from trying that question.]

Per Curiam.¹

Rule discharged.

¹ PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

The Guardians of the Poor of the Romford Union v. The British Guarantee Association.

THE GUARDIANS OF THE POOR OF THE ROMFORD UNION v. THE
BRITISH GUARANTEE ASSOCIATION.¹

Trinity Term, 1852.

Covenant — Surety of Fidelity of Collector of Poor Rate — Certificate of Loss — Pleading — Damage.

A declaration stated, that, by a deed between B. of the first part, the defendants of the second part, and the plaintiff of the third part, after reciting that B. had been appointed collector of poor rate for the parish of D., and that he had been required to find security for the faithful discharge of his duties, and that the defendants had consented to give such security, the defendants as surety did covenant with the plaintiffs that B. should at all times, whilst he continued in his said office, faithfully account for all sums which he should receive: And the defendants further covenanted, "that a certificate under the hand of the auditor of the district, stating the amount of loss, should be conclusive evidence against the defendants of the truth of the certificate, and that the policy had become forfeited thereby to the amount of the loss stated in such certificate, and should form a valid and binding charge and claim against the defendants, without any further or other proof being given by the plaintiffs in any action of the amount of such loss; or that the same had been occasioned through the default of B. The declaration then averred, "that, after the making of the deed, B. received divers moneys which he did not account for, and that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises to the amount of 800*l.*, and alleged, as a breach, the non-payment of that sum by the plaintiffs. Plea to the declaration, so far as related to the auditor having certified, that for thirteen years before the making of the deed, B. was collector, and during that time had not accounted for divers sums which he received, and by reason thereof was, at the time of making the deed, in arrear; and that the loss so certified was the amount of loss occasioned as well by such arrears as by the non-accounting in the declaration mentioned; without this, that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises in the declaration mentioned to the amount of 800*l.* : —

Held, on special demurrer, that the plea was bad, as being a plea to the damage only.

COVENANT. The declaration stated that, by a deed made between W. Beadle of the first part, the defendants of the second part, and the plaintiffs of the third part, (profert); after reciting that W. Beadle had been appointed to the office of collector of poor-rates for the parishes of Barking and Dagenham, and that he had been required to find security for the due and faithful discharge of his duties while he should be employed in the said office; and that the defendants, at his request, had consented to give such security upon the terms and subject to the provisos and conditions therein contained; the defendants, as surety for W. Beadle, did covenant with the plaintiffs that W. Beadle should and would, from time to time and at all times thereafter, whilst he continued in his said office of collector of poor rates, duly and faithfully discharge the duties of the office, and in particular should and would faithfully, honestly, and punctually account to the plaintiffs for all and every sum and sums of money, bank-notes, &c., which he, whilst acting in his said office, should from time to time receive. And the defendants further thereby covenanted with the plaintiffs that a certificate, under the hand of the auditor of

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the district within the said union, stating the amount of any loss occasioned by the acts or default of any payment or duty by W. Beadle, while in his said office, should be sufficient and conclusive evidence against the said association of the truth of the certificate, and that the policy had become forfeited thereby to the amount of the loss stated in such certificate, and should form a valid and binding charge and claim against the association, without any further or other proof being given by the plaintiffs in any action to enforce the policy against the defendants of the amount of such damage or loss, or that the same had been sustained, incurred, or occasioned by and through the acts or act or default of W. Beadle. Averments, that, after the making of the deed, and whilst W. Beadle continued in his said office of collector, he did not faithfully, &c., account to the plaintiffs for divers sums of money, amounting to 2,000*l.*, which he, whilst acting in his said office, and after the making of the said deed, did, from time to time, by virtue of his office, receive for poor-rates of the said parishes; and although a reasonable time for W. Beadle to account for the said money had elapsed, and he was requested so to do, yet he had not accounted for the said sums, but had converted the same to his own use, of which the defendants had notice, and were requested to pay the loss to the extent of 800*l.*; and E. Banks, the auditor for the said district, afterwards certified under his hand to the plaintiffs and defendants, that a loss had been occasioned to the plaintiffs by means of the premises, to the amount of 800*l.*, of which the defendants had notice. Breach, non-payment of the said sum of 800*l.*

Plea to the declaration, so far as it relates to E. Banks having certified, that, for and during divers, to wit, thirteen years next before the making of the deed and policy, W. Beadle had been and was collector of poor rates for Barking and Dagenham aforesaid, having been duly appointed to the office of collector, and having, during all that time and until the making of the deed or policy, continued in the office, and during the said time W. Beadle had not, according to his duty in that behalf, accounted for or paid divers moneys, to wit, the amount of 800*l.*, which he had received during the time aforesaid by virtue of his office, and was, by reason thereof, before and at the time of the making of the deed of policy, in default and arrear in respect of the moneys so received by him, to wit, 800*l.* That the amount of the loss which E. Banks so certified was the amount of loss occasioned as well by and in respect of such default and arrears, as by and in respect of such non-accounting by W. Beadle, as in the declaration mentioned; without this, that E. Banks certified that a loss had been occasioned to the plaintiffs by means of the premises in the declaration mentioned, to the amount of 800*l.*, *modo et formâ*. Concluding to the country.

Special demurrer, assigning for cause (amongst others), that the plea was pleaded to damages and not to cause of action. Joinder in demurrer.

Doe d. Benson v. Frost.

Willes appeared in support of the demurrer; but the court called on

O'Malley (*Whitmore* with him) to support the plea. The plea affords a good defence to so much of the declaration as it professes to answer. The plaintiffs' cause of action is founded on the auditor's certificate that there was a loss of 800*l.*, for which the defendants were responsible. But the inducement of the plea shows that part of the loss so certified arose from the default of the collector before the policy was granted, and for which, therefore, the defendants are not responsible. That amounts to an argumentative denial that the auditor certified a loss to the extent of 800*l.* by means of the premises mentioned in the declaration, and so the plea properly concludes with a special traverse to that effect.

[ALDERSON, B. The auditor's certificate is only evidence of the amount of damage.]

PLATT, B. Would the declaration have been good if it had stated that the defendants were indebted by reason of the certificate, without showing any default on the part of the collector?]

The plaintiffs have treated this as a covenant on the part of the defendants to pay whatever damage the auditor shall find that the plaintiffs have sustained; then, in order to show that they rely on the certificate, and having thus rendered it material, the defendants are entitled to traverse it.

[ALDERSON, B. They can only traverse the fact of the making of the certificate. This plea attempts to put in issue the amount of loss which the defendants have agreed shall be proved by the certificate.]

Upon the face of the declaration, it appears that there was a valid certificate to the extent of 800*l.*; the plea shows that there was not. Unless this statement be traversed, the plaintiffs, at the trial, might claim a verdict for 800*l.*, without offering any evidence of the amount of loss, on the ground that it was admitted on the record.

[ALDERSON, B. If the statement were struck out of the declaration, it would nevertheless be good.]

Upon the suggestion of the court, *O'Malley* elected to amend, by withdrawing the plea.

Amendment accordingly.

DOE d. BENSON v. FROST.¹

May 31, 1851.

Landlord and Tenant — Tenant at Will.

A landlord has a right to distrain upon his tenant at will.

After the tenant at will entered into possession there was an agreement for a lease of the

¹ 17 Law Times Rep. 145.

Doe *d.* Benson *v.* Frost.

premises, but no lease was ever prepared; on the back of the draft there was an indorsement made and signed between the parties; rent had been paid, and a receipt given for a quarter's rent, and a distress also had been put in by the landlord upon the tenant:—

Held, not sufficient to alter the original tenancy at will into a tenancy from year to year.

THIS was an action of ejectment, to recover possession of a house in Russell Square, and was tried before Martin, B., in Middlesex, on the 16th of May, when a verdict was found for the lessor of the plaintiff.

James, Q. C., moved to set that verdict aside, and the question to be raised was, whether the tenancy alleged to be subsisting between the parties was a tenancy at will only, or a tenancy from year to year, so that if it should be the latter, the defendant would have been entitled to a proper notice to quit in the usual way. There had been an agreement made for a lease of the premises, but no lease was ever prepared. The defendant was in possession of the premises from the year 1848 until 1850, when this ejectment was brought; a draft lease was prepared but not signed, and on the back of this draft lease was an indorsement made containing terms, and subsequently signed. In March, 1850, Benson required security for the rent, and asked for a deposit of title deeds; this had been given, and 40*l.* paid for a quarter's rent, as due to the month of December previous; the defendant was originally a tenant at will, no doubt, but the question is, whether these facts, subsequently occurring, are not evidence for the jury to draw an inference that there was a tenancy from year to year created. The landlord, too, had put in a distress, in December, 1850, for rent, and there appears to be no authority to show that a tenant at will merely, can be distrained upon, as such, by his landlord.

[*MARTIN*, B. Surely there must be. He referred to Coke, Litt. sec. 69, title, "Tenant at Will," where it says, "If a woman make a lease at will, reserving a rent, and she taketh husband, this is no countermand of the lease at will, but the husband and wife shall have an action of debt for the rent; and so it is if a lease be made to a woman at will, reserving a rent, and the lessee taketh husband, this is no countermand of the lease, but the lessor may have an action of debt, or distrain them for the rent." In *Hargrave and Butler's* note to that sec. it says, "Also, in 1 Sid. 339, it is said to have been agreed by the court that if land be leased at will, and the rent is reserved half yearly or quarterly, the lessee cannot determine his will two or three days before the rent day, because that would be a fraudulent determination."]

POLLOCK, C. B. There will be no rule in this case; the defendant was originally a mere tenant at will, and so continued; none of the circumstances mentioned by Mr. James, as having subsequently taken place, appear to me to have altered that, so as to convert the terms of holding into a tenancy from year to year.

ALDERSON, B. I am of the same opinion; there is nothing done

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afterwards inconsistent with the original agreement of a tenancy at will.

PLATT, and MARTIN, B. B., concurred.

Rule refused.

NEWBOLD and another v. THE EAST LANCASHIRE RAILWAY COMPANY.¹

January 30, 1852.

Award—Setting it Aside.

Agreement that arbitrator should award a money compensation for the damage, or instead thereof actual repairs of the damage done.

ATHERTON, Q. C. and *J. Henderson*, had obtained a rule to set aside the award made herein, on the ground that the arbitrator had misled (accidentally) the parties.

Bramwell and *Gray*, contra.

The facts and circumstances of the case sufficiently appear in the judgment of the court.

Cur. adv. vult.

May 1. POLLOCK, C. B., delivered judgment. This was a motion as to setting aside an award. The affidavits were of some length, but when the answer comes to be considered with reference to the objections taken, we are of opinion that the rule must be discharged, and of course with costs.

The motion was founded upon this suggestion, no doubt to some extent supported by the affidavits that were used by Mr. Atherton, when he moved the rule. The ground of the application was this, that there being a question between Newbold and the railway company in respect of some damages, it was referred to an arbitrator to decide all matters in difference between them, and Mr. Fisher was the arbitrator who was so selected. It was said that it was a question for him to decide, whether he would award that the railway company should do the work, and make the reparations that were necessary to restore things to the condition in which they were before the damage was done, or whether he was to award a sum of money in gross instead of them. It was contended on the part of Mr. Atherton, that he had misled the parties, not perhaps otherwise than accidentally, or not wantonly or fraudulently, but it was suggested that he had led them to expect that he would award the

¹ 19 Law Times Rep. 123.

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damage to be repaired, and that he would not award the amount of damage in money; that in consequence of that, they abstained from giving a great deal of evidence that they otherwise would have given, and which, had it been given, would have materially affected the result, and that they left in the expectation that he would merely award such and such repairs to be done, and that that would be the mode in which he would put an end to their differences. When Mr. Bramwell came to show cause against the rule, he produced the affidavit of one of the parties, Mr. Newbold, the partner, I think, of the attorney, and of the arbitrator himself; and from that it appears that originally — it being suggested that the award should be in the shape of a money compensation, or by actual repairs — that that was objected to on the part of the defendant, and actually struck out of the original draft. The passage in the affidavit of James Park, who is the partner of Mr. Newbold, the plaintiff, is this: he says that the draft agreement of reference was prepared to give to the plaintiff compensation for putting and continuing the plaintiff's mill, buildings, and premises in good and substantial repair, and the attorneys for the company struck the clause out of the draft agreement, and wrote in the margin thereof the following words — "The company are not to do any more work; the matter is to involve a money question only; it is understood that the company are to do nothing to the premises." That is put with their signature. Subsequently, it appears that Mr. Martin Fisher, the arbitrator, suggested that no evidence should be given upon the actual subject, either of the repairs or of the expenses; that he was able to judge for himself, and power should be given to him by the plaintiffs and defendant to order the repairs to be done as he might think proper on personal inspection, and the suggestion was absolutely refused and declined by the said John Grundy, in the first instance, but was acceded to ultimately on the part of their clients, with this addition, that as he (Grundy) contended the repairs done were sufficient, the power was to be given to the arbitrator to order further repairs to be done, or that he was to give the money payment. And upon going over the whole of the affidavits, especially the affidavit of the arbitrator, it appears to be perfectly clear that it was left to the arbitrator to award either the one or the other, — that nobody was, or ought to have been at least, deceived by any such arrangement; that the result of the whole matter is, that the company may be extremely dissatisfied with the award, but that is properly a question of merits, upon which ground we cannot set it aside. It appears to us, therefore, that the objection taken by Mr. Atherton, when he moved for the rule and apparently substantiated by his affidavits, are completely removed and answered by the affidavit on the other side. We are, therefore, of opinion that the rule must be discharged with costs.

Rule discharged.

 Lysley v. Clarke.

STEVENSON v. DICKENSON.¹

April 22 and May 1, 1852.

Bill of Sale — Possession — Seizure under ff. fa. — Growing Crops.

A father, in expectation that a judgment would be recovered against him, transferred his farm to his son :—

Held, that if the jury found that the transfer was really made, the growing crops belonged to the son.

POLLOCK, C. B. This was a rule moved for by my brother Wilkins, in a cause tried before Alderson, B. The point left by the learned judge to the jury was this, that if they believed the transaction to be true, then he thought the plaintiff was entitled to recover a quantity of hay that had been seized, which had grown upon the premises. Now, the circumstances were these : an action had been brought against the father, and he, expecting that there would be damages recovered against him, and that there would be judgment, no doubt purposely transferred the property to his son ; with the assent of the landlord, the son took possession, manured the farm, labored it, and at length reaped or mowed a crop of hay, and that was the hay that was seized, and it was contended that it might be seized because the farm continued to be the property of the father, — that is not so ; in point of fact the transfer was made ; then, the growing crop in the meantime, while the son was in possession, and while the son was giving his labor to the land and manuring it, and doing that which would end in there being a crop of hay, — all the fruits of the land to that time belonged to him. Alderson, B., left to the jury to inquire whether they believed the transaction really was so ; they found that it was, and the learned judge said, if that was so, then the hay was the property of the son and not of the father. We think that direction was perfectly right, and that in this case there ought to be no rule granted.

Rule refused.

 LYSLEY v. CLARKE.²

November 18, 20, and 22, 1851.

Executor de son tort — What constitutes.

A person receiving money from another, who is an executor *de son tort*, which he applies partly in payment of a debt due to himself from the deceased, and partly in payment of

¹ 19 Law Times Rep. 123.

² 18 Law Times Rep. 142.

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funeral expenses, returning a small balance in his hands, is not an executor *de son tort*; but it may be evidence thereof in connection with other facts.

THIS was an action on a promissory note against the defendant as executor *de son tort*. Pleas, *ne unques executor* and *plene administravit*.

At the trial at Guildhall, before Pollock, C. B., a verdict was returned for the plaintiff for 25*l*. A rule having been obtained for a new trial,

Hawkins now showed cause. The only question was, whether the evidence was such as to make the defendant liable as executor *de son tort*. The defendant had sent in an account by which he showed that he had paid himself out of certain moneys coming to his hands. The money due to the defendant was paid to him by the widow after the decease of the testator. The fact was that the debt was his father's debt, and not his own, which he had taken upon himself to liquidate. *Padget v. Priest*, 2 T. R. 97, decided that if A, the servant of B, sell the goods of C, an intestate, as well after his death as before, though by the order of C, and pay the money arising therefrom into the hands of B, B may be sued as an executor *de son tort*, and also, that if a person has money belonging to an intestate in his hands at the time when an action is brought against him as executor for a debt due from the intestate, he is liable as an executor *de son tort*; and *Mountford v. Gibson*, 4 East, 441, was a case very like the present; there it was decided that a creditor of an intestate who receives goods of the intestate after his death from his widow, in payment of his debt, cannot protect his possession against an action of trover by the lawful administrator upon the ground of such delivery having been made by one who had, by such intermeddling, made himself executor *de son tort*. The payment cannot be protected if the person has knowledge of the circumstances. *Sealey v. Powis*, 1 Har. & W. 2; *Paull v. Simpson*, 9 Q. B. 365; and *Sharland v. Mil-den*, 5 Hare, 469, were also referred to.

Bovill (*Needham* with him) in support. At the trial the learned judge had proposed to leave the facts to the jury; we disputed the facts stated by the other side, and examined the accounts and statements. The receipt of 37*l*. 10*s*. from the widow for his own debt, does not make the defendant executor *de son tort*; neither does the receipt of money from an executor *de son tort* make the receiver executor *de son tort*. All the cases cited are clearly distinguishable; there is no direct authority on either side.

Cur. adv. vult.

POLLOCK, C. B. In this case, which was a motion for a new trial, we are of opinion that there ought to be a new trial. The action was against the defendant, charging him as executor *de son tort*. There were two pleas, *ne unques executor* and *plene administravit*. At the trial it was proposed that as there was very little in dispute,

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the court should give their opinion upon the first plea, whether there was enough to charge the defendant as executor, and at that time the only fact upon which it was proposed to take the opinion of the jury was, whether a sum of money, traced into the hands of the defendant apparently, was a debt due to himself or a debt due to his father. If it were a debt due to his father, probably he was not at all responsible for his father having received the money; if it were a debt due to himself, there were clear grounds, if he was executor, to charge him to that amount, as that would have made him liable to the full extent. Mr. Bovill, on the part of the plaintiff, proposed that that course should be taken. Mr. Hawkins refused to take that course, and would not give the court power to say how the verdict should be entered with reference to the first plea. It may, perhaps, not be perfectly clear what course the court would have taken if that arrangement had been made between the counsel; but I think the probability is, that the court would have come to the conclusion that there was abundance of evidence by which the jury might be directed to find, and ought to have found, that the defendant was executor *de son tort*. But that evidence required to be distinctly stated, considered, weighed, and decided upon; and, although it may be very clear that the court would have come to that conclusion, if the matter had been so left to them (if they had had the power of acting as a jury), that not having been acceded to, it seems to us to be impossible to take it for granted that the case is now in the same position in which it would have stood if Mr. Hawkins had agreed to that proposal; and it appears to all of us—I must say it appears to me, presiding at the case—just as much as it does to my learned brethren, that the real points were not sufficiently put before the jury (one must lament any miscarriage of justice which leads to a new trial, particularly when one sees that the result, probably, will be precisely the same on the second trial. As it is, both parties having agreed at one period, and while the summing up was going on, that the court should consider it, my attention was rather distracted from that point, and was directed chiefly to the question of *plene administravit*; and I must admit that the question, whether the defendant was really executor *de son tort*, or not, was not put to the jury with the distinctness and with the caution, and with the fulness with which it ought to have been, if it was for the jury to determine. On these grounds, it appears to me, and to the whole of the court, that there must be a new trial.

PARKE, B. Upon the bare facts, there certainly is evidence to go to the jury of a connection between the widow and the defendant, which might lead them to come to the conclusion, that from the first they had agreed to make a division of the property of the intestate among themselves. Very likely they were acting one with the other; but assuming that to be not the case (which was a question for the jury), the simple point we had to decide was, whether the fact of the defendant receiving the money from a person who is already executor *de son tort*, which he applied partly for his own debt and partly for funeral expenses, and had a trifling sum remaining in his hand, whe-

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ther, in respect of the receipt from the executor *de son tort*, he could be considered to be executor *de son tort*. Upon the case of *Paull v. Simpson*, 9 Q. B. Rep. 365, which proceeded upon the authority of Godolphin's "Orphan Legacies," and also upon the authority of a case in Comyn's "Digest," the mere fact of the receipt from a person already executor *de son tort*, would not constitute him executor *de son tort*; that simple fact, and if the case is presented simply on the facts, it is nothing more than a receipt from the executor *de son tort*, and that would not constitute the defendant executor *de son tort* on the authority of that case. In order to constitute an executor *de son tort*, it must be a person who interferes himself with the effects of the testator, not receiving them from the executor *de son tort*, but himself either intermeddling with the personal chattels belonging to the testator, and taking possession of them himself, or receiving money from the debtors of the testator. If he does so, why then, whether he receives it on his own account, or as the agent for somebody else, would make him equally executor *de son tort*; he is a wrong-doer, and whether he acts on his own account or for another, he is equally responsible. That was settled in the case of *Padget v. Priest*, 2 T. R. 97, and *Sharland v. Milden*, 5 Hare, 469. On the bare facts of this case there did not appear to my lord, or, on consideration, to the rest of the court, sufficient to make out that the defendant was executor *de son tort*; therefore, there should be a new trial, and then the question will be, whether from the first the defendant and the widow were not acting together to take possession of the property of the intestate, and not to divide it among the real creditors at all.

*Rule absolute.*HUNT v. HEWITT.¹

June 3, 1852.

Inspection of Documents.

The 14 & 15 Vict. c. 99, s. 6, has not given to courts of common law a power to compel a discovery, by a bill or analogous proceeding—the only power given to them by it, is to allow an inspection by one litigant party, of documents in the custody or under the control of the other litigant party, with the restrictions or limitations pointed out in that section.

The 14 & 15 Vict. c. 99, s. 6, has not taken away the jurisdiction previously possessed by courts of common law, to order the inspection and copy of documents in the hands of an adverse party.

Under the 14 & 15 Vict. c. 99, s. 6, where an inspection is litigated, the party applying for it must show by affidavit that an action or other proceeding is pending, and also circumstances sufficient to satisfy the court or judge, that there are in the possession or under the

¹ 16 Jur. 508; 21 Law J. Rep. (N. S.) Exch. 210; 7 Exchequer Rep. 236.

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control of the opposite party certain documents relating to such action, &c., — a *prima facie* case calling for an answer, must at least be stated in this respect.

Further, as the party making such application is in the same situation as a plaintiff in a court of equity, he must show — first, what is the nature of the suit, and of the question to be tried in it, and it seems, also, that he should depose in his affidavit to his having just grounds to maintain or defend it; secondly, the affidavit ought to state, with sufficient distinctness, the reason of the application, and the nature of the documents, in order that it may appear to the court or judge that the documents are asked in order to enable the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them.

To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them — or he may show on affidavit that the part concealed does not in any way relate to the plaintiff's case.

Honeyman, in Hilary term, obtained a rule for the inspection of documents under the 14 & 15 Vict. c. 99, s. 6. This rule was argued during that term, on the 31st January, before Pollock, C. B., Parke, Alderson, and Martin, BB.; when

Lush showed cause, and

Honeyman was heard in support of his rule.

The whole case appears in the judgment of the court. It will be sufficient to add that the following authorities were referred to in the course of the argument: Story's Eq. Plead. § 325; *Bolton v. The Corporation of Liverpool*, 1 My. & K. 88; 3 Sim. 467; *The Attorney-General v. The Corporation of London*, 12 Beav. 8; and *Smith v. The Duke of Beaufort*, 1 Hare, 507; 1 Ph. 209.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. In this case an application was made to the court, to compel the plaintiff to allow an inspection of a day-book or journal kept by the plaintiff.

An application had previously been made, of a more extensive nature, to my brother Platt at chambers. It was a summons to inspect all documents in the custody or under the control of the plaintiff relating to the action, particularly the day-book or journal, and of any other book containing an entry of business done for the defendant's nephew, or for several other persons named; and also all plans in his possession or custody, of any house, drains, roads, &c., or other portions of the defendant's estate, in respect of the alleged surveying and superintending the erection and formation of which the action was brought.

This summons was supported by an affidavit, laying no sufficient grounds for inspection of all the documents. My brother Platt made an order to inspect the plans only. An application was then made to the court, on an amended affidavit, for an inspection of the day-book and journal, and a rule *nisi* granted. It was heard before us in the course of Hilary term; and we took time to consider, not so much on account of any difficulty in the present case, as on account

of the importance of the practice under the 14 & 15 Vict. c. 99, s. 6, upon which it is extremely desirable to lay down some rules.

The section is in these words — “Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such section or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge.”

It seems to us to be clear, from the words of this section, that the legislature never intended to give the courts of common law a power to compel a discovery, by a bill or analogous proceeding—the only power given is to allow, not a discovery, but an inspection by one litigant party, of documents in the custody or under the control of the opposite litigant party, with certain restriction or limitations. First, there must be a suit, or rather proceeding, pending. Secondly, the documents must relate to such action, suit, or other proceeding. And, thirdly, the cases in which inspection is to be granted must be such as those where inspection could be obtained by filing a bill for a discovery, or by other proceeding in a court of equity, at the instance of the same party. All that is stated on the subject of discovery is by way of limitation or description of the subjects of inspection. We think this question has been put on the right footing by Mr. Charles Pollock, in his treatise on the power of the courts of common law to compel the production of documents for inspection, (pp. 9, 10); and there is a decision of Earle, J., *Galsworthy v. Norman*, 21 Law J. Rep. (N. S.) Q. B. 70; s. c. 9 Eng. Rep. 327, after consulting the other judges of the Queen’s Bench, that the courts of law have no power of compelling a discovery; and this court, on one or two occasions, has intimated its opinions to the same effect. *Pepper v. Chambers*, 16 Jur. 19; s. c. 7 Eng. Rep. 589. See also *Sneider v. Mangino*, 16 Jur. 153; s. c. 9 Eng. Rep. 488.

In order to accomplish the object of obtaining such inspection of documents, as there is no power to entertain a bill of discovery or any analogous mode of proceeding in courts of common law, the old mode of obtaining inspection of documents in the hands of the opposite party must be adapted to it. It has been usual for the court, in the exercise of their equitable jurisdiction, to grant such inspection. First, as a substitute for oyer, which, at common law, applied to some instruments only, by usage the power of inspection was, with certain conditions, extended to all. Secondly, upon the equitable principle that a *cestui que trust* had a right to oblige his trustee to give inspec-

tion, the courts of law always compelled it where they could consider the opposite party as holding the document under an express or implied trust for the applicant. In the former case an affidavit, generally speaking, was unnecessary. In the latter it was required, unless the facts were admitted in the statement of the applicant's attorney, a course usually adopted at chambers to save expense. The old mode of obtaining inspection ought to be adopted under the new act of parliament, with such alterations as the nature of the case requires. Under the recent act of parliament, where an inspection is litigated, an affidavit will no doubt be necessary as to all the disputed facts, and if all are disputed the affidavit ought to state a sufficient case in all respects to entitle the applicant to inspect, as would have been necessary to obtain an inspection which the court had before and still has the power to grant at common law. The affidavit, therefore, ought not only to show that an action or other proceeding is pending, but also to state, not a mere suggestion, but circumstances sufficient to satisfy the court or judge, that there are in the possession or under the control of the opposite party certain documents, and that those relate to such action, or other legal proceeding; a *prima facie* case calling for an answer, must, at least, be stated in this respect, as it must in the old proceeding, to obtain inspection of documents held by a trustee. Further, the affidavit must show that the applicant would, by a bill for a discovery or other proceeding, be able to obtain a discovery and inspection of those documents.

Under the last head, we must follow the rules established in courts of equity, within which every plaintiff must bring himself in order to obtain an inspection by bill of discovery; and therefore, if the facts be disputed, the affidavit ought to state all that a plaintiff in equity must state, in order to entitle himself to a discovery and inspection.

Whatever difference there may be with respect to some points in the law of discovery, for instance as to the mode of pleading in equity to raise the objection on the part of the defendant, the general principles laid down are free from doubt, and are fully explained in the able treatises of Sir J. Wigram and, Mr. Hare, and the little work published by Mr. Charles Pollock.

The right of a plaintiff in equity is limited, first, to a discovery, confined to the questions in the cause; and secondly, of such material documents as relate to the proof of his (the plaintiff's) case on the trial, and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case.

The party applying, therefore, who is in the same situation as a plaintiff in equity, must show—

First, what is the nature of the suit, and of the question to be tried in it, and it seems also that he should depose in his affidavit to his having just grounds to maintain or defend it.

Secondly, the affidavit ought to state, with sufficient distinctness, the reason of the application, and the nature of the documents, in order that it may appear to the court or judge that the documents

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are asked in order to enable the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them.

To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them — or he may submit to show facts, covering the remainder, on affidavit that the part concealed does not in any way relate to the plaintiff's case. The same course would be pursued in equity.

Although the recent act of parliament has not given the courts of law the direct power of compelling a discovery of documents, and in that respect they are not so effective as courts of equity, they have in truth nearly as great power given by the section in question — for it will rarely happen, where documents material to the issue are really in the hands of the opposite party, that there will not be sufficient circumstances known to the applicant to constitute a *prima facie* case for him, and to justify the interference of the court or a judge if no answer is given to them by affidavit. The new measure will therefore, in practice, be nearly as effective as if the power of compelling a discovery were expressly given to the common-law courts.

It remains to apply these observations to the affidavit in question. It does state the question and ground of defence, namely, that the work was never done, that if done, it was charged at too high a rate, and further, that it was done on the credit of another, not the defendant. The defendant's case is therefore of a negative character — he does not seek to know the evidence by which the plaintiff supports his case, for the journal or day-book would not be evidence for the plaintiff. The defendant in support of such a case has a right to a discovery on the principle of the case of *Smith v. The Duke of Beaufort*, 1 Hare, 507; 1 Ph. 209; but so far as relates to the discovery of the journal as evidence in support of the defendant's case, that the credit was given to another, the affidavit is defective, as it does not deny that the deponent was authorized to bind the defendant by his contract, and if he was it is wholly immaterial whether credit was given to him in the plaintiff's journal or day-book or not. But the book must be inspected to see if there be any entry, and if any and what price is therein charged as the value of the work.

Rule absolute.

HOLMES v. SIXSMITH.¹

May 27, 1852.

Stamp — Fraud — Trotting Match.

On the trial of an action against the stakeholder to a trotting match, by the party whose

¹ 16 Jur. 619; 21 Law J. Rep. (N. S.) Exch. 312.

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horse was defeated, to recover back his stake, the plaintiff first put his case on the ground that the race was an illegal one; and on this being overruled, set up that he had been induced by fraud to enter into the match, the horse which ran against his having been a different horse from the one he purported to be, and disguised by paint to represent him:—

Held, that in order to prove this fraud, the articles of agreement for the match were receivable in evidence without a stamp.

ASSUMPSIT for money had and received. Plea, *non assumpsit*. At the trial before Cresswell, J., it appeared that the action was brought to recover a sum of money deposited by the plaintiff with the defendant, as stakeholder, on a trotting match between the plaintiff's horse "Jackey" and a horse called "Flying Cloud," belonging to one John Williams. "Jackey" having been beaten in the race, the stakeholder, in disregard of a warning notice from the plaintiff, paid the stakes over to Williams. The plaintiff's counsel at first put his case on the ground that wagers on trotting matches were illegal, but this being overruled by the judge, he then set up that the plaintiff had been induced by fraud to enter into the wager, as the horse represented to be "Flying Cloud" was in reality another horse called "The Oneida Chief," disguised by paint; and for this purpose he offered in evidence the articles of agreement under which the race was run. This document being unstamped was objected to by the defendant's counsel, but the judge overruled the objection, reserving leave to move to enter a nonsuit on that point. The jury having found for the plaintiff,

Wilkins, Serg., in Easter term obtained a rule accordingly.

Knowles, *Edwin James*, and *T. Jones*, showed cause. The stamp laws only affect documents offered in evidence as valid ones, capable of being acted on, and are wholly inapplicable when a document is offered in evidence for some collateral purpose, such as to show fraud, or as constituting a link in a chain of proof of fraud. Were this not so, all frauds worked by means of documents requiring stamps would escape with impunity, as the guilty parties would take care not to stamp them. This view of the law has been established by several cases. The principal is that of *Coppock v. Bower*, 4 M. & W. 361. There a party entered into an illegal agreement in writing, but unstamped, not to proceed with a petition to the house of commons against bribery at an election. The other party having brought an action to recover the sum agreed to be paid, that document was held admissible to prove the illegality of the contract. Lord Abinger, C. B., in delivering his judgment, says—"The principal question in this case is, whether the stamp acts were intended to apply where the instrument is used, not as evidence of an obligatory contract between the parties, but to show that the transaction between them is of such a nature as to be void in law. And there are many authorities, that for such a purpose it may be received in evidence without a stamp. The object of both the statute and common law would be defeated, if a contract, void in itself, could not be impeached, because

the written evidence of it is unstamped, and therefore inadmissible. If that were so, a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is whether the agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility. As in the case of a conspiracy, or an agreement to commit a robbery, on no principle could it be contended that a contract between the parties for the commission of such an offence would be inadmissible without a stamp. I think that the stamp acts are made for a different purpose — they are made to prevent persons from availing themselves of the obligatory force of an agreement, unless that agreement is stamped.” And Alderson, B. “The statute enacts, that a stamp is necessary upon an agreement, ‘whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument.’ Taking the whole together, it must be implied that a stamp is unnecessary, where the instrument shows no contract in law, and cannot be enforced between the parties. Now, here, the written papers were not obligatory between the parties, and they were put in evidence to show what is called a void agreement, but which, under the circumstances, is no agreement at all.”

In *Regina v. Gompertz*, 9 Q. B. 824, which was an indictment for a conspiracy to defraud the prosecutor, by inducing him to accept certain bills of exchange, a warrant of attorney which was given to him for the purpose of inducing him to accept them, was held receivable in evidence without a stamp. Lord Denman there says, “The reception in evidence of a warrant of attorney without a stamp was another ground of application for a new trial. This is a point of very great importance; for few frauds are committed without the intervention of written instruments made subject to the stamp duties; and yet on such occasions they are rarely stamped. The giving such an instrument as a security, on the face of it valid to an ignorant person’s apprehension, but really unavailable for want of a stamp, may sometimes be one of the means by which the fraud is practised, and, where the object of the evidence is not to enforce or set up the instrument as a valid instrument, but merely to show that it was part of a scheme of fraud, and so to use it for a purpose collateral to the object apparent on the face of it, there are many cases in which it has been held that a written instrument, requiring a stamp but unstamped, is admissible. On the other hand, if there be any allegation to the proof of which an instrument available in law is necessary, or if it be tendered as such instrument, unless, as in forgery, it be itself the subject-matter of the charge, then it cannot be received unstamped, if of a nature requiring a stamp. This distinction is well known; and it is needless to cite the cases which establish it.”

In *Smart v. Nokes*, 6 Man. & G. 911, which was an action of debt with pleas of *nunquam indebitatus* and payment, the plaintiff offered in evidence a document in which the defendant admitted the debt, but stated that it had been paid by a bill of exchange; held that the

bill of exchange, though improperly stamped, was admissible to negative the inference of payment by that bill. Tindal, C. J., in delivering judgment, said, "*Sweeting v. Halse*, 9 B. & Cr. 365, is the strongest case against the plaintiff. But in that case the very purpose of giving the unstamped bill in evidence was, to prove an existing contract between the parties — namely, a contract to cancel the former bill — not, as here, to show that the unstamped instrument was unavailable. It would be singularly unjust that a plaintiff, in availing himself of a memorandum which proved that the defendant was indebted to him, should be bound by every assertion or statement in that memorandum, and should be wholly without the power of showing that they were untrue."

In *Keable v. Payne*, 8 Ad. & El. 555, which was an action for goods sold and delivered, the case for the plaintiff being that the defendant received them from M., who had obtained them from the plaintiff, the owner, by pretending to purchase and pay for them by a check drawn on a party, who as M. knew would dishonor the check, it was held that the check was admissible though not stamped. The defendant's counsel contending that there was a distinction between the case of criminal proceedings against the guilty party and civil ones, where it is sought to make the unstamped document evidence against a third person not party to the fraud, and who was a *bonâ fide* purchaser, Patteson, J., says, "I cannot recognize the distinction. Whether against the person accused of the fraud, or a third party, the principle must be the same, if the question turn on the fact of fraud. If it were necessary, in a civil action, to show that there had been a felony, or an obtaining by false pretences, the evidence would be admissible as if the case were that of an indictment for the felony or the fraud."

In *Enthoven v. Hoyle*, 16 Jur. 272; s. c. 9 Eng. Rep. 434, in Cam. Scac., where the question was as to the admissibility in evidence of some debentures of a joint-stock company, and which were not duly stamped, Parke, B., in delivering judgment says, "We are all of opinion that these bonds or debentures were properly admitted in evidence for one purpose, that is, for the purpose of showing that really they were worthless as such, and therefore laying a foundation for the plaintiff's right to recover upon the money counts. If they had been used in order to support the special counts, it would have been wrong, because they were not on proper stamps. *Williams v. Gerry*, 10 M. & W. 296, will probably be relied on by the other side. That was an issue to try the property in goods claimed by the plaintiff under a bill of sale; a former bill of sale of the same goods, which had been cancelled, being tendered in evidence to show that the second bill of sale was given *bonâ fide* and not fraudulently, it was held inadmissible without a stamp. But there the rejected document was attempted to be set up as a valid agreement.

Wilkins, Serg., and *Henderson*, in support of the rule. Every agreement which is valid on its face, so as to be capable of being enforced between the contracting parties, or even by one of them

against the other, must be stamped before it can be received in evidence. The stamp acts were passed for the benefit of the revenue, and it would be dangerous if the necessity of stamping an agreement were to depend on the contracting parties electing to enforce it. Besides, third persons might be interested in the document, or want to make use of it in other proceedings. Now the agreement in the present case was legal on its face, binding at least one, perhaps both, of the contracting parties at the time it was made. If the plaintiff's horse had won, he might have treated the agreement as a valid one, got it stamped, and sued upon it.

[MARTIN, B. Suppose the plaintiff had brought an action for the stake on the ground that his horse had won, and it was proved that his horse was beaten, could he then have said that the agreement was a fraud?]

Certainly not, and that shows the abuses to which the plaintiff's view of the law would give rise. In all the cases which have been referred to, the document received in evidence was admitted to show that it was on its face a nullity. *Regina v. Gompertz* may seem an exception; but that was the case of a one-sided instrument, which the person, by whom alone it was signed, sought to enforce against another party.

POLLOCK, C. B. We are all of opinion that this rule must be discharged. The case is really undistinguishable from *Regina v. Gompertz*, 9 Q. B. 824. That case arose on a warrant of attorney, on the face of it a good and valid instrument, requiring a stamp before it could be given in evidence; and in the present case the agreement sued on is likewise a legal one, the only ground for impeaching it being that it was a fraud. No doubt it was a gross fraud. The question is whether, where a party by fraud induces another to enter into a written agreement, it is necessary that the aggrieved party put a stamp on the instrument before he asks to get back his money on the ground of the fraud. Now, I go entirely with the decision of the Court of Queen's Bench in *Regina v. Gompertz*. I think that an agreement does not require a stamp unless when it is used as and for an agreement—if it is used merely as part of the machinery of a fraud, to show that the person paying the money has been imposed on, no stamp is required. Thus in civil cases—if a document is used as an agreement it must be stamped; but not when it is used for any collateral purpose—as, for instance, if used as a piece of paper to identify some person by being found in his possession, or to connect one person with another, or to connect two pieces of paper together, and such like. And, in criminal cases, although an instrument might, as such, require a stamp, and be in itself free from fraud, still if used to establish crime, it does not require a stamp. Thus, where a prisoner is indicted for forgery, the forged instrument is receivable in evidence though it has either no stamp or a wrong stamp. My brother Wilkins points out a bad use which he says might be made of this state of the law. He observes that in the present case the plaintiff did not set up fraud in the first instance, but insisted that the agree-

ment was void altogether; and if that had not been a mode of putting the plaintiff's case in the same parallel, if I may so say, with the other, there might be some force in the argument. A case was also put during the argument, supposing that the plaintiff had claimed the stake under the agreement, and it turned out that his horse was beaten in the race, could he, it was asked, have set up the fraud afterwards? I do not believe that he could have done so; for having once affirmed the contract by claiming the stake, he could not afterwards turn round and say, "I will have my money back on the ground of fraud." A man cannot blow hot and cold—affirm and disaffirm. But both the modes in which the plaintiff here shaped his case were in truth the same—they were different modes of obtaining the same result—namely, that the agreement was not worth a farthing. The first was that the agreement was an illegal contract, and if it were, no stamp would be required; that failing, the plaintiff's counsel then said, "I will show it was a fraudulent contract"—both of these are consistent with the doctrine that the agreement did not require a stamp. In the first place then, I think we have the true principle on this subject laid down in most of the cases which have been cited, and have further a special decision in this sort of case in *Regina v. Gompertz*.

ALDERSON, B. I am of the same opinion. What the plaintiff says in substance is this—You, the defendant, have paid over to another person money which belonged to me, when you ought not, and I had given you notice not to do so. Then, in order to show that the defendant had the plaintiff's money, and had paid it over improperly, he says, there was a gross fraud practised on me—I was induced to run a horse against another by sharpers, and you paid the money to those sharpers. How does he make that out? He says, here is a piece of paper which purports to be an agreement to run my horse "Jackey" against the other horse, "Flying Cloud," there being in truth no such horse as "Flying Cloud," and the whole was a trick to bring into the race a totally different description of a horse, in order to cheat me. How can you prove that better than by producing the paper containing the agreement? In so doing the plaintiff does not set it up as an agreement, but as a concocted fraud. The principle of *Coppock v. Bower* is the same with this, except that there the paper appeared illegal on the face of it, here the illegality is to be made to appear by showing that it formed a portion of a fraud; but the principle of both is, we do not set the document up, but knock it down, by showing that it is either apparently illegal or a fraud.

PLATT, B., concurred.

MARTIN, B. I cannot distinguish this case from *Regina v. Gompertz*. If that case did not exist, I should not have so clear an opinion on the subject as the rest of the court. For when I find the law saying, such and such documents must be stamped and shall not be receivable in evidence unless they are stamped, it is the duty of par-

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ties to see that they are stamped, and that is what the parties in this case have not done. But I think the matter is concluded by *Regina v. Gompertz*.

ALDERSON, B. It is easy to suppose such a case as this—two persons conspire to defraud an ignorant man of his money, by giving him bills of exchange on insufficient stamps. According to the doctrine of the defendant's counsel, you could not use those bills in evidence in order to show the circumstances necessary to prove the fraud.

Rule discharged.

 PHILLIPS v. POUND.¹

June 7, 1852.

Arrest — Privilege — Attorney's Clerk.

The managing clerk of an attorney is not privileged from arrest while going to attend before a judge at chambers, on business of his master.

HAWKINS had obtained a rule to discharge the defendant out of the custody of the sheriff of London, by whom he had been arrested on a *ca. sa.* issued in this action; on the ground that he was privileged from arrest. The defendant was managing clerk to an attorney, and in that capacity obtained a judge's order for a *certiorari* to remove a plaint from a county court into the Court of Queen's Bench on payment of costs; the judge adding that if one of the Masters would certify that those costs would be allowed on taxation, a further application might be made to him to vary the order. The next day the defendant obtained such a certificate from the Master at his office in King's Bench-walk Temple, and was arrested while *bond fide* proceeding thence with it to attend the judge, for the above-mentioned purpose, at his chambers in Rolls-gardens, Chancery-lane.

Hannen showed cause, citing *Newton v. Constable*, 2 Q. B. 157; 6 Jur. 317, where it was held, that a barrister attending petty sessions for the purpose of obtaining practice is not privileged from arrest *redeundo*.

The court then called on

Hawkins, in support of the rule. An attorney's clerk is privileged from arrest whenever he is *bond fide* attending a tribunal in the conduct of the business of his master; and it would be very inconve-

¹ 16 Jur. 644; 21 Law J. Rep. (N. S.) Exch. 277.

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nient if the law were otherwise, seeing that much of the business at judges's chambers is managed by such clerks. In *Meekins v. Smith*, 1 H. Bl. 636, the court laid down as a general rule "that all persons who have relation to a suit which calls for their attendance, whether they are compelled to attend by process or not (in which number bail are included), are entitled to privilege from arrest *eundo et redeundo*, provided they come *bonâ fide*." And in *Ex parte Watkins*, 1 Jur. 236, it was held that an agent attending an appeal before the house of lords, though neither attorney nor solicitor, could not be arrested *redeundo*.

[ALDERSON, B. If an attorney's clerk is to be privileged from arrest, why not a barrister's clerk?]

Because he is not engaged in the actual conduct of the cause.

ALDERSON, B. He might be actually carrying his master's brief to him. Some persons are privileged from necessity, *i. e.* such as attend the court in obedience to its command, in which case the court protects them from the consequences of their obedience. Others are privileged by prescription, such as barristers, attorneys, and probably proctors. The present case however comes under none of these.

POLLOCK, C. B. There is also this distinction. Unless the necessary parties to conduct a suit were privileged from arrest the court would be interrupted in its proceedings, and might have to wait for every witness who is to give evidence, every barrister to argue, and every attorney to instruct. But where a party is going to do something which might be done at any other time, and his absence has not the effect of keeping the court waiting, he has no privilege from arrest. Were this not so, persons would enter into the service of attorneys at a very cheap rate in order to obtain a privilege from arrest.

Rule discharged.

BENHAM v. THE UNITED GUARANTEE AND LIFE ASSURANCE COMPANY.¹

June 7, 1852.

Policy of Assurance — Warranty — Statement in Policy.

An assurance company effected a policy with a literary institution, to guarantee to a certain amount against loss which might be occasioned by the want of integrity, honesty, or fidelity of one R. W., in his employment as secretary to the institution. The basis of the contract was alleged to be a certain statement in writing, by the treasurer of the institution, lodged at the office of the company, containing a declaration of the truth of the answers to certain questions. There was likewise a proviso, that any fraudulent misstatement or suppres-

¹ 16 Jur. 691; 21 Law J. Rep. (N. S.) Exch. 317; 7 Exchequer Rep. 744.

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sion in that declaration should render the policy void from the beginning. The statement referred to, contained, *inter alia*, the following questions and answers:—First, "Is the applicant at present in your employment, and if so in what capacity, and has he hitherto performed the duties of his situation faithfully and to your satisfaction?" A. "He is secretary to the — Literary Institution." Secondly, "Is the applicant personally known to you, or any of your firm, or by whom has he been introduced or recommended to you?" A. "Only as above." Thirdly, "In what capacity do you intend to employ the applicant: and with reference to this question state, as far as circumstances will permit, (A) the nature of his intended duties and responsibilities?" A. (A) "He is secretary of the — Literary Institution, of which I am treasurer." (c) "The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced, and closed?" A. (c) "Examined by finance committee every fortnight." (d) "The salary or emolument, and when it will be paid to him, and how and when it will be paid?" A. (d) "80*l*. a year at present:—"

Held, that the statement that the accounts of R. W. would be examined once a fortnight by the finance committee of the institution did not amount to a warranty; and consequently, that an action was maintainable on the policy for a loss occasioned by his want of integrity in the service of the institution, although such loss was occasioned by their neglecting to examine his accounts in the manner specified in the policy.

COVENANT, on a policy of insurance, against a registered assurance company. The declaration alleged, that on the 13th May, 1850, by a certain instrument or policy of guarantee, sealed with the common corporate seal of the defendants, (making profert); after reciting, that the Marylebone Literary and Scientific Institution had agreed to take into their service and to employ as secretary, one R. W., in the said policy of guarantee described, upon the condition of his procuring a sufficient surety to guarantee the plaintiff, therein described as, and then being the treasurer of the said institution, to the extent of 200*l*., against loss occasioned by the want of integrity, honesty, or fidelity of the said R. W., in such service or employment; and that in performance of the said condition, the said R. W., with the concurrence of the plaintiff as such treasurer, had agreed with the defendants for the grant by them to the plaintiff of that policy of guarantee; and that as the basis of the contract for such guarantee, the plaintiff had lodged at the office of the defendants a certain statement or document in writing, in the policy of guarantee described as "Employers' Guarantee Proposal, No. 624," containing, among other things, a declaration signed by the plaintiff of the truth of the answers thereby given to the questions therein contained; and also reciting that R. W. had paid to the defendants or their duly authorized agent or officer, the sum of 2*l*. 10*s*. as the premium or consideration for such guarantee as thereafter expressed, for the space of one year, commencing on the 13th May, 1850, and terminating on the 13th May, 1851, both inclusive: it was witnessed, that the defendants, fully relying on the truth of the declaration contained in the said statement or document, did thereby agree and declare that during the space of one year, commencing and terminating as aforesaid, and afterwards during every succeeding year, in respect of which the defendants should consent to receive, and the said R. W., and the plaintiffs, or one of them, should before or upon the 13th May, in the same year, pay, or cause to be paid, unto the said defendants, or unto such officer or agent thereof, as should be duly authorized by the directors of the company to receive the same, the annual premium or sum of 2*l*. 10*s*., &c., the general funds and pro-

party for the time being, and the subscribed capital of the defendant company, but none of the members or officers thereof, individually or personally, should, to the extent or amount in the whole of 200*l.*, &c., but to no further or greater extent or amount, be subject and liable according to the deed of settlement and rules of the company, to satisfy, reimburse, and make good unto the plaintiff or other the treasurer for the time being of the said institution, or the representatives or assigns of the said institution, within three calendar months next after proof should be given to the reasonable satisfaction of the directors of the said company of the occurrence of such next-mentioned loss, every loss whatsoever, which, during the continuance of the liability of the company under the said policy, should be sustained by the treasurer of the said institution, by reason or in consequence of the want of integrity, honesty, or fidelity of the said R. W., in, or arising out of his employment to be such secretary of the said institution. And, it was by the policy of guarantee provided, that (so far as the next-mentioned rules and regulations were capable of application to the same), the said policy and the guarantee thereby granted or undertaken, should be subject and liable to the rules of the said company referred to by the notice of even date therewith, thereupon indorsed, and to all other the then existing rules and regulations of the company relative to policies of guarantee and guarantees granted or undertaken thereby, and that in the same manner as if all the said rules and regulations were actually incorporated at length in the policy with special reference thereto. And it was thereby further provided, that the policy was granted upon the express condition, that every person at any time making any claim thereunder, should, at the costs of the defendant company, whenever required so to do by the directors or other duly authorized agents or agent thereof, afford every description of aid or assistance capable of being afforded by such person for the purpose of enabling the defendant company or the directors, or other duly authorized agent or agents thereof, to prosecute or bring to justice the said R. W. for any criminal offence committed by him while such secretary, or to procure the reimbursement of the said company by the said R. W., or his estate, of moneys paid by or recovered from the company under the policy.

The declaration then proceeded to set out the notice as follows :—
“ Take notice, that by the rules which, in the first schedule to the deed of settlement of this company, are numbered 130, 131, 132, 134, 135, and 136, (and to which you are referred for more particular information), it is provided to the effect, that any fraudulent misstatement or suppression in any declaration, in consequence of and with express reference to which a policy of guarantee is granted by the company, renders such policy void from the beginning; that the annual premium payable upon a policy of guarantee granted in consideration of an annual premium must be paid within fifteen days from the day on which it first accrues due, and that if paid within such fifteen days the policy does not become void, but if not so paid, then (subject to a discretionary power for the directors, within three calendar months, to remit the forfeiture upon such terms as they

think proper) the policy will be absolutely void: that the right to make a claim, under a policy of guarantee, ceases three months after the death of the party whose integrity is guaranteed: that (subject to a discretionary power exercisable in certain cases by the directors, of remitting the forfeiture,) a policy of guarantee becomes void as to future claims, upon notice and satisfactory proof to the directors, of the commission or omission by the party whose integrity is guaranteed of any act which results in the accrual of the right to make a claim under the policy, and that the holder or party entitled to the benefit of a policy of guarantee is bound, immediately upon discovering or having notice of the commission or omission by the party whose integrity is guaranteed, of any act resulting in the accrual of the right to make a claim under the policy, to forward a written intimation of the same, and so far as circumstances will permit, of all particulars attending the commission or omission thereof, to the directors; and that by wilfully and knowingly omitting or neglecting so to do for ten days after such discovery or notice, the policy becomes absolutely void, both as to existing and future claims. Dated the 13th May, 1850."

The declaration proceeded to allege, that the statement or document referred to in the policy of guarantee, and therein described as "Employers' Guarantee Proposal, No. 624," contained certain questions and answers, that is to say—First, "Is the applicant at present in your employment, and if so, in what capacity, and has he hitherto performed the duties of his situation faithfully and to your satisfaction?" The answer of which was, "He is secretary to the Marylebone Literary Institution." Secondly, "Is the applicant personally known to you, or any of your firm, or by whom has he been introduced or recommended to you?" The answer to which was, "Only as above." Thirdly, "In what capacity do you intend to employ the applicant; and with reference to this question, will you state as far as circumstances will permit, (A) the nature of his intended duties and responsibilities?" The answer to which was, (A) "Mr. W. is secretary of the Marylebone Literary Institution, of which I am treasurer." Another of which said questions was, (c) "The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?" The answer to which was, (c) "Examined by finance committee every fortnight." Another of which said questions was, (D) "The salary or emolument which will be paid to him, and how and when it will be paid?" The answer to which was, (D) "80*l.* a year at present." And another of which said questions was—Fourthly, "Shall you require any further pecuniary guarantee for the applicant's integrity than that proposed to be obtained from this company to the extent of £—, and if so, what is the nature and amount of the further guarantee you require?" The answer to which was, "No." And another of which said questions was—Fifthly, "Are you aware of any reason why a guarantee of the applicant's integrity should be considered as more than usually hazardous?" The answer to which was, "No." The declaration then averred, that no answers except as aforesaid were

given to the questions contained in the statement or document in writing, in the policy described as "Employers' Guarantee Proposal," &c., and that the said answers and the said declaration concerning the same were true; that R. W., to wit, on the said 13th May, 1850, became and was the secretary to the said institution, and so remained and continued from the time of the sealing of the policy of guarantee, until the 18th July, 1851, and the said institution, during all that time, retained and employed him in their service in the capacity aforesaid; that the plaintiff during all that time remained and continued, and still is the treasurer for the time being of the institution; that during the continuance of the liability of the defendants under the said policy of guarantee, to wit, on the 13th May, 1851, the defendants consented to, and did then receive from the said R. W., and the said R. W. then paid to them a certain other annual premium or sum of 2l. 10s., &c., as and by way of premium or consideration for continuing such policy of guarantee for one year, commencing the said last-mentioned day and terminating on the 13th May, 1852, both inclusive, and thereupon, and according to the terms of the policy of guarantee, and under and by virtue of the same, and the last-mentioned receipt and payment, the general funds and property for the time being, and the subscribed capital of the defendant company during the last-mentioned space of one year, commencing and terminating as aforesaid, were to the extent or amount of 200l. liable according to the deed of settlement and rules of the company, and subject to the rules and regulations, clauses, provisos, stipulations, and conditions contained in the policy of guarantee, to satisfy, reimburse, and make good unto the plaintiff, or other the treasurer for the time being of the institution, within three calendar months next after proof should be given, to the reasonable satisfaction of the directors of the company, of the occurrence of the next-mentioned loss, every loss whatsoever, which, during the continuance of the liability of the defendants under the policy, during the last-mentioned period, should be sustained by the treasurer of the institution by reason, or in consequence of the want of integrity, honesty, or fidelity of R. W., in or arising out of his employment, to be such secretary of the institution, as in the same manner and according and subject to the said rules and regulations, clauses, provisos, stipulations, and conditions contained in the said policy of guarantee.

The declaration then set forth, that after the 13th May, 1850, and before the 13th May, 1852, and whilst R. W. remained and continued such secretary, and during the continuance of the liability of the company under the policy of guarantee, to wit, on the 14th May, 1850, and on divers other days and times between that day and the 23d July, 1851, R. W., in the capacity of, and in the course of his employment and duties as such secretary, was intrusted with and held for the benefit and on account of the institution, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of 188l. 11s. 1d.; and the same then, to wit, on the day and year last aforesaid, by reason, and in consequence of the want of integrity of R. W. in his employment as such secretary, to wit, by his embez-

zlement thereof, became, and was wholly lost, to wit, to the institution and the plaintiff as such treasurer; and the plaintiff and the institution then, to wit, on the day and year last aforesaid, and not before, discovered and had notice of the same; that after such loss, and immediately, the plaintiff and the institution, or either of them, discovered or had notice of the same, or of the commission or admission by R. W., of the act which resulted in the accruer of the right to make a claim under the policy of guarantee, &c., and within ten days of such discovery and notice, or either of them, to wit, on the day and year last aforesaid, the plaintiff forwarded a written intimation of the same, and so far as circumstances would permit, of all particulars attending the commission thereof, and then gave proof to the reasonable satisfaction of the directors of the defendant company of the occurrence of the loss; and the period of three calendar months next after such proof, &c., had elapsed before the commencement of the present suit; and concluded by stating, with the usual necessary averments, a breach by the defendants in not making good the above loss of 188*l.* 11*s.* 1*d.*, although the funds of their company were sufficient for the purpose.

To this declaration the defendants pleaded, first, as to 100*l.*, parcel of the 188*l.* 11*s.* 1*d.*, &c., payment of money into court, and no damage *ultra*; secondly, that "the statement or document in writing, in the policy of guarantee in the declaration in this action, mentioned and described as "Employers' Guarantee Proposal, No. 624," lodged by the plaintiff, and the declaration in the statement or document signed by the plaintiff as in the declaration in this action mentioned, were respectively lodged and signed, and all the several questions and answers in the statement and document in the declaration in this action mentioned were respectively proposed to and returned by the plaintiff, the treasurer of the institution in the declaration mentioned by and with the authority of the said institution, to form and did form, the basis of the contract for such guarantee as in the declaration in this action mentioned; and that whilst R. W. remained and continued such secretary as in the declaration mentioned, and before the loss of the residue of the sum of 188*l.* 11*s.* 1*d.*, and before the want of fidelity, &c., of R. W. in respect of that residue, and before his embezzlement thereof, to wit, on the 14th May, 1850, and thence continually until and after the loss of the whole of the said residue, &c., and the want of integrity, &c., of R. W. in respect thereof, and his embezzlement thereof, divers, to wit, twenty-six of the fortnights for the examination by a finance committee of the accounts of R. W. in the answers to the third question in the declaration in this action mentioned had elapsed, and the plaintiff and the institution in the declaration mentioned, wholly failed and neglected, during the whole of the time last aforesaid, to use the said checks to secure accuracy in his accounts, by any fortnightly or any other examination thereof, &c., by any finance committee; and wholly failed and neglected to hold or institute, or cause to be held or instituted, any such examination stipulated for as part of the basis of the contract of guarantee in the policy of guarantee, and the statement or document described as "Employers' Guarantee

Proposal, No. 624," and the questions and answers therein and in the said declaration in this action mentioned, and during all the time last aforesaid no such examination was ever had or held; and the defendants further say that the loss of the whole of the said residue of the sum of 188*l.* 11*s.* 1*d.*, and the want of integrity, &c., of R. W. in respect thereof, and his embezzlement thereof, occurred during the time of such failure and neglect to examine his accounts by a finance committee every fortnight, and in consequence and by reason of such failure, neglect, and default, &c." The plaintiff took out of court the money paid in under the first plea; and to the second demurred specially. The defendant joined in demurrer, but it was agreed, on the argument, not to notice matter of form, and discuss only matter of substance.

Bovill, for the plaintiff. This is an absolute policy of guarantee for the fidelity of R. W.; while secretary to the Marylebone Literary and Scientific Institution. The other side will contend, that its effect is conditional on his accounts being examined every fortnight by the finance committee of that body. But in policies of insurance there is a great difference between general statements and warranties. If the provision in this policy as to the mode of examining the accounts of R. W. is to be read as a warranty, the neglecting to examine them for a day, or even an hour, after the time specified would put an end to the policy.

[*POLLOCK*, C. B., referred to *Shaw v. Robberds*, 6 Ad. & El. 75; and *Martin*, B., *Barrett v. Jermy*, 3 Exch. 535.

Bovill was then stopped.]

Lush, *contra*. The stipulation in this policy that the accounts of R. W. are to be examined every fortnight forms part of the basis of the contract between the parties, and as such amounts to a warranty. In policies of insurance the distinction between a warranty and a representation depends on this — whatever materially affects either the risk or premium, even though put in the margin of the instrument, is to be construed as a warranty; whereas, any thing else contained in it is a mere representation, the falsity of which does not vitiate the policy, unless shown to have been wilfully and fraudulently made. In *De Hahn v. Hartley*, 1 T. R. 343, Lord Mansfield says, "A warranty in a policy of insurance is a condition or a contingency, and unless that is performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied with. Now in the present case, the condition was, the sailing of the ship with a certain number of men; which not being complied with, the policy is void." The fact that the accounts of a person intrusted with money will be examined at certain stated times by his employer, materially effects the risk incurred by a party who insures his fidelity. But further, the language of this particular policy shows the intention of the parties that this examination of accounts should be matter of substance. The contract was entered into on the faith

of the credit given to the answers to several questions. Some of these relate to things past, and are consequently not the subjects of warranty; the rest relate to future events, but of these one, namely, the amount of the salary, is not a warranty; the answer being qualified, *i. e.* so much at present. But the answer to the question as to the capacity in which R. W. is to be employed, is absolute and involves a warranty — if I make myself surety for a man employed as a porter, and his employer makes him treasurer, my guarantee is at an end. So, the question and answer under consideration, what “checks will be used to secure accuracy in his accounts?” relate to a future event, and are in an absolute form.

[MARTIN, B. According to your argument, if the finance committee neglected to examine this man’s accounts for one week after the end of any fortnight of his service, the whole security of the guarantee would be gone.]

If the opposite construction is to prevail they might with safety leave those accounts unexamined for ten years.

[POLLOCK, C. B. Suppose that after the making of the policy, the company adopted some more convenient mode of securing the accuracy of their secretary’s accounts; *e. g.* by compelling him every evening to pay in to a banker’s all the moneys received by him during the day, and that he afterwards ran off with a sum of money, would the defendants be liable? If this is a warranty it must be construed literally, and therefore, although the company had found out a better mode of checking his accounts, they would still be obliged to go through the idle ceremony of having them examined by the finance committee.]

That argument cannot apply to the present case, for the plea expressly avers, that the loss was occasioned in consequence of the neglect of the company to examine the accounts according to the provision in the policy. The cases which have been cited differ in this, that in none of them was it stated that the representation in question should form the basis of the contract.

Bovill was not called on to reply.

POLLOCK, C. B. The manner in which this question is put in the policy, the questions with which it is associated in that instrument, and the decisions which have taken place on other policies of insurance, lead us to the conclusion, according to the best opinion we can form on the subject, that the portion of the policy in question was not meant or understood by the office as any thing more than a declaration of the course they intended to pursue; and if that communication was made *bonâ fide* and honestly at the time, I think it does not prejudice the right of the plaintiff to maintain this action. Our judgment, therefore, must be for the plaintiff.

ALDERSON, PLATT, and MARTIN, BB., concurred.

Judgment for the plaintiff.

SAUNDERS v. DAVIES and Wife.¹

May 28, 1852.

Practice — Costs of New Trial — Perverse Verdict.

THIS was an action of contract; to which the defendant pleaded the general issue and payment. At the trial, before Martin, B., the defence set up was that payment had been made to the wife of the plaintiff, and that he had afterwards ratified that payment. The judge having left the case to the jury, they found for the defendant.

Grove, in Easter term, obtained a rule for a new trial, on the ground that the verdict was against the evidence and perverse.

Benson (abs. *J. Evans*) showed cause, and contended that there was some evidence to go to the jury.

Grove and *Bowen* appeared in support of the rule.

The court having intimated an intention to make the rule absolute, the question arose whether it should be on payment of costs.

POLLOCK, C. B. My definition of a perverse verdict is this — when a jury choose not to take the law from the judge, but will act on their own erroneous view of the law. In such cases, however honest the intentions of the jury may be, their verdict is perverse.

ALDERSON, B. At any rate such a verdict ought to fall within the same rule as mistakes made by a judge as to the law. I cannot conceive any reason why, if a jury take on them to determine the law, and determine it wrong, there should be a difference as to costs. There is, however, this difference, when they decide wrong on the facts, namely, that they are in a different position from us; for they have had before them the demeanor of the witnesses, and other matters not visible to the court, and thus may have had reasons for their verdict of which we know nothing.

MARTIN, B. I never could understand why parties are to pay costs where juries give verdicts contrary to evidence.

ALDERSON, B. Nor I.

POLLOCK, C. B. I agree with my brothers Alderson and Martin. It is time that parties who are in no default whatever, and not responsible for mistakes committed in the administration of justice,

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should not be compelled to pay costs when they come to the court for redress.

PLATT, B. Where injustice has been done.

The court deeming the verdict perverse, made the —

Rule absolute, without costs.

· CLAY and another v. SOUTHERN.¹

April 19, 1852.

Joint-stock Company — Contract — Principal and Agent.

A joint-stock company, consisting of more than twenty-five members, was formed subsequently to the 5th of September, 1844, but not registered pursuant to the 7 & 8 Vict. c. 110. Its capital was divided into shares, and its profits divided among the holders of them, but any proprietor could transfer his shares without the consent of the rest. A, a member of this company, entered, by means of a memorandum made by B, his agent, into a contract with C, that the company should supply him with certain articles on certain conditions. Those articles were supplied accordingly, and were shown to be the property of the company: —

Held, that A might sue C on this contract.

ASSUMPSIT by the plaintiffs Clay and Newman, for goods sold and delivered and on an account stated. Plea, *non assumpsit*. The bill of particulars described the action as brought to recover payment for certain iron pillars and brine, supplied by the plaintiffs to the defendant. At the trial, before Platt, B., it appeared that the plaintiffs were members of a salt manufacturing company, entitled "The Droitwich Patent Salt Company." The capital of this company was divided into shares, and its profits divided among the holders of them; but though formed since the 5th September, 1844, and consisting of more than twenty-five members, any one of whom could transfer his shares without the consent of the rest, the company was not registered pursuant to the 7 & 8 Vict. c. 110. The goods, the subject of the present action, were the property of the company, and had been delivered under the following agreement; whether made by authority of the company did not appear: —

"*Memorandum, Dec. 30, 1850.*

"The company to supply Mr. Southern with brine at 6*d.* per ton of salt. The company's and Mr. Southern's make of salt to be regulated according to the superficial measure of their respective pannage. A minimum price to be fixed for fine and broad salt. The company

¹ 16 Jur. 1074; 7 Exchequer Rep. 717.

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to be at liberty to discontinue supplying Mr. Southern with brine on giving twenty-one days' notice, and Mr. Southern to be at liberty to cease taking the brine on giving a similar notice.

"For Clay & Newman,

"J. W. LEA.

"HENRY SOUTHERN."

At the close of the plaintiffs' case it was objected by the defendant's counsel that the plaintiffs were not the proper parties to sue, the entire consideration proceeding from the company, and the plaintiffs being nothing more than their agents to make the contract. The judge refused to stop the case, but reserved leave to the defendant's counsel to move to enter a nonsuit on that point. The jury having found for the plaintiffs for 203*l.* 13*s.*,

Alexander moved accordingly. The contract here was in truth the contract of the company; the present plaintiffs could neither sue nor be sued upon it. The case closely resembles *Lucas v. Beach*, 1 Man. & G. 417; 1 Scott's N. R. 350; 4 Jur. 631.

[PARKE, B. The rule is that an action may be maintained either against the person who makes a contract or against those by whom he was employed to make it. Here the parties making the contract are the plaintiffs, and they may declare on it for themselves, though the consideration proceeded from the company. There was a case of *Williams v. Marsden* to this effect, which was tried on the Oxford circuit by Patteson, J.

Gray, *amicus Curiae*, here mentioned that that action was brought by one J. W., on behalf of himself and the other proprietors of a Yorkshire mine, who were, like the present company, a fluctuating body; that the court in banc had granted a rule for a new trial on another point, but refused one on the present ground.

PARKE, B., then read that case from a manuscript note, observing that the present was as like it as possible; and that *Lucas v. Beach* differed in this, that there the very mode in which the contract was signed showed it to have been signed on behalf of the company, whereas here the plaintiffs signed the contract on behalf of themselves; and that too by means of their agent, who could not be considered in any sense as the agent of the company.]

The precise language of the contract in *Williams v. Marsden* might perhaps be ascertained on inquiry.

PARKE, B. The principle is so plain that we need not look at any other contracts. Looking at this contract on the face of it only, Clay and Newman may be treated as the contracting parties. They contract for themselves that the defendant shall be supplied with brine by the company from time to time. It is a well established rule of law, that either the party actually entering into the contract may sue on it, or those by whose authority he contracts. In this case it may be that the company could adopt this contract and sue on it, by showing that Clay and Newman were authorized to make it on their

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behalf; and though on the other hand if Clay and Newman would be responsible for violating their contract in not supplying the defendant with brine as agreed on, still it does not follow that the company are not responsible on the same contract, if it could be proved that Clay and Newman entered into it on their behalf. There is good reason why such actions as these should be maintainable; for this company being a fluctuating body, not registered, and the shares of any member being transferrable *ad libitum* without the consent of the others, it would be impossible for parties to ascertain whom to sue.

ALDERSON, and MARTIN, BB., concurring.

Rule refused.

IN THE EXCHEQUER CHAMBER.

THE EASTERN UNION RAILWAY COMPANY v. HART and another.¹

May 12, and June 1, 1852.

Mortgage by a Railway Company — Right of Action upon — Appointment of Receiver.

Where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment, if money be so borrowed and so secured, and not duly repaid, an action may be maintained against the corporation on breach of the covenant, although there are no specific statutory provisions enabling them to bind themselves by such a covenant.

Money was borrowed by the E. U. Railway Company, under the powers conferred by a local act (7 & 8 Vict. c. 85), whereby they were authorized to borrow, and to secure repayment by mortgage of the railway and future calls, (Sect. 37,) and to fix the period for repayment, in which case they were to cause a period to be inserted in the mortgage deed, at the expiration whereof the principal and arrears of interest should be paid. (Sect. 49.) It was further provided, that if the principal and interest were not paid within six months after they had become payable, and after demand thereof in writing, the mortgagee or bond creditor might sue for the same, or if his debt amounted to 5,000*l.*, he might require the appointment of a receiver, (Sect. 52); and that if the interest remained unpaid for thirty days after it had become due, and demand thereof made in writing, the mortgagee or bond creditor might sue in an action of debt, or might require the appointment of a receiver. (Sect. 51.) It was further enacted, that where no time was fixed in the deed or bond for the repayment of the money, the creditor might, at any time after twelve months from the date of the mortgage deed or bond, demand payment of the principal, with all arrears of interest, on giving six months' previous notice. (Sect. 56.)

In an action of debt upon a mortgage deed executed by the company under this act, and which deed contained the following stipulation, "The principal sum to be paid on the 1st of January, 1851:" —

Held, affirming the judgment of the court below, that the action could be maintained.

Held, also, that the right of action upon the mortgage did not depend solely upon sects. 51 and 52, nor were the conditions therein mentioned, namely, the expiration of six months

¹ 17 Jur. 89; 8 Exchequer Rep. 116; 22 Law J. Rep. (N. S.) Exch. 20. Before COLERIDGE, WIGHTMAN, CRESSWELL, ERLE, WILLIAMS, TALFOURD, and CROMPTON, JJ.

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in one case, and of thirty days in another, after demand of payment, conditions precedent to the bringing of an action upon such mortgage, but that such sections only recognized a preëxisting right of action, and added thereto another specific remedy, namely, the appointment of a receiver, at the option of the borrower, after the expiration of the above period.

[*Hart v. Eastern Union Railway Company*, 8 Eng. Rep. 544, affirmed.]

THIS was a writ of error, brought by the defendants below (the Eastern Union Railway Company), upon a judgment of the Court of Exchequer, given on demurrer to the plea of the defendants below. The action was in debt, and the declaration stated, that "after the passing of four acts of parliament, to wit, the Eastern Union Railway Act, 1844; the Eastern Union Railway Amendment Act, 1845; the Eastern Union, Hadleigh, and Colchester Railway Act, 1846; and an act of the 11 & 12 Vict., intituled "An Act to amalgamate the Eastern Union and Ipswich and Bury St. Edmund's Railway Companies;" and after the making of the deed of mortgage hereinafter mentioned, it was proved to the satisfaction of the commissioners of railways, and certified by them, that one half of the whole amount of the capital, exclusive of loans, by the several acts of parliament, relating to the company, namely, the Eastern Union Railway Company, mentioned and referred to in the first-mentioned act of parliament, authorized to be raised, and also half of the capital authorized to be raised by acts of parliament, relating to the Ipswich and Bury St. Edmund's Railway Company, mentioned and referred to in the said act fourthly above mentioned, had been actually paid up and expended for the purposes authorized by the several acts of parliament, relating to the said two last mentioned companies respectively; and that thereupon, and by virtue of the act of parliament, fourthly above-mentioned, the defendants became incorporated by the said name of "The Eastern Union Railway Company." That after the passing of the said acts of parliament, and of the Eastern Union and Harwich Railway and Pier Act, 1847, and before the granting of the certificate, the Eastern Union Railway Company, in pursuance of the provisions of the said last-mentioned act, and also of an order of a general meeting of the last-mentioned company them empowering, by a certain deed of mortgage, in consideration of 1,000*l.* by the company then borrowed at interest from the plaintiffs, the company did assign to the plaintiffs the undertaking in the said last-mentioned act mentioned, and all the tolls and sums of money arising by virtue of that act, and all the estate, right, &c., of the company in the same, to hold unto the plaintiffs until the sum of 1,000*l.*, with interest at 5*l.* per cent., should be satisfied; and by the said deed it was stipulated that the principal sum of 1,000*l.* should be repaid on the 1st January, 1851, being the period fixed by the company for the payment thereof, which period elapsed after the certificate, before the demand hereinafter mentioned, and before action." Averment, that before the making of the said order of the said general meeting, and the borrowing of the money, all the moneys by the acts of parliament, first, secondly, and thirdly above-mentioned, authorized to be raised by shares, had been subscribed for, and that half thereof had been paid up; and that the sum so bor-

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rowed of the plaintiffs did not, at the time of the borrowing and at the date of the mortgage, together with other sums then borrowed under the authority of the said acts, exceed the sum of 66,666*l.*, in addition to the sum which, by the three last-mentioned acts, the Eastern Union Railway Company was empowered to borrow; and that, from the making of the said deed, the plaintiffs have been and still are the holders of, and entitled to the said deed of mortgage; and that the said principal sum of 1,000*l.* was not paid to the plaintiffs on the 1st January, 1851, but that the said principal sum is still due. The declaration then stated a demand of payment of the 1,000*l.*, and non-payment by the defendants. The plea craved oyer of the mortgage deed, which was in these words — “Eastern Union Railway Company. Debenture bond, 1,000*l.* mortgage, No. 112. By virtue of an act passed on the 22d July, 1847, intituled ‘The Eastern Union and Harwich Railway and Pier Act,’ we, the Eastern Union Railway Company, in consideration of the sum of 1,000*l.* paid to us by J. G. Hart, of Stowmarket, in the county of Suffolk, Esq., and Charles Robert Bree, of Stowmarket, in the county of Suffolk, surgeon, do assign unto the said J. G. Hart and Charles Robert Bree, their executors, administrators, and assigns, the said undertaking, and all the estate, right, title, and interest of the company in the same, to hold unto the said J. G. Hart and Charles Robert Bree, their executors, administrators, and assigns, until the said sum of 1,000*l.*, together with interest for the same, at the rate of 5*l.* for every 100*l.* by the year, be satisfied, the principal sum to be paid on the 1st January, 1851. Given under our common seal,” &c. The defendants then pleaded that they borrowed from various other persons divers sums of money, parcels of the 66,666*l.*, and executed to them mortgages of the same tolls and sums of money as are mentioned in the deed-poll, and in the form given in schedule (C.); that the 1,000*l.* mentioned in the declaration was another parcel of the 66,666*l.*; that the said sums are still unpaid, and that the sums applicable for the payment thereof are insufficient; that, for securing to the said mortgagees their proportions, it was necessary for a receiver to be appointed to divide the same ratably, or that some other course, not being an action at law, should be adopted; and that the present action was brought for the purpose of obliging the defendants to pay to the plaintiffs more than their just proportion of the mortgaged tolls and sums of money. To this plea there was a demurrer, upon which judgment was given for the plaintiffs below.¹

¹ The 7 & 8 Vict. c. 85, “An Act for making a railway from Colchester to Ipswich,” enacts, by section 51, “in order to provide for the arrears of interest and costs, or of the principal and interest and costs, of any such mortgage or bond, at the respective times at which such interest, or such principal and interest and costs, become due, that if such interest, or any part thereof, shall, for thirty days after the same shall have become due, and demand thereof shall have been made in writing, remain unpaid, the mortgagee or bond creditor may either sue for the interest so in arrear by action of debt in any of the superior courts, or he may require the appointment of a receiver, by an application to be made as hereinafter provided.”

Section 52. “And with respect to such principal money, interest, and costs, be it

Bramwell (*Willes* with him), for the plaintiffs in error. This case has been decided against the company both by the Court of Exchequer and Court of Common Pleas; but in the latter court it was scarcely argued, as it was felt that the court would consider itself bound by the decision of the exchequer. The question turns on the sufficiency of the declaration; and that depends upon another question, namely, whether a right of action is given by statute against the company upon this instrument. The company are a statutory corporation for certain purposes, and they cannot act except in conformity with their powers, which they must strictly follow: *The East Anglian Railways Company v. The Eastern Counties Railway Company*, 16 Jur. 249; s. c. 7 Eng. Rep. 505, in which a contract for a lease by a railway company was held bad, as being *ultra vires*. *Gage v. The Newmarket Railway Company*, 16 Jur. 1136; s. c. *ante*, p. 57, is to the same effect. The special act empowers the company to borrow money, and the statutes and instruments themselves are to be looked at in order that it may be seen whether there is a right of action. It may be conceded, that if a right of action existed independently of the statute, it is not taken away, as there is no express prohibition; but if no such right existed, the question would be, whether it was given by the statute. The money was borrowed under a local act, 10 & 11 Vict. c. 225, whereby the company are empowered to borrow on mortgage or bond, as in the 8 & 9 Vict. c. 94, which refers to the 7 & 8 Vict. c. 85, which, in fact, is the regulating act of all these local acts. If no term is fixed for repayment, the bond does not contain any terms of covenant. If a term is fixed, yet the repayment must be according to the act of parliament. It can scarcely be contended that an action may be maintained in the one case and not in the other. The rights of the obligee of the bond are quite different from those of the mortgagee. (Sect. 43.) The latter is entitled to tolls, and to be paid without preference. The obligee is entitled to be paid out of tolls or other property and effects of the company. The obligee, therefore, has a more extensive right than the mortgagee, who has no specific lien on the property mortgaged. *Russell v. The East Anglian Railways Company*, 3 Mac. & G. 104; s. c. 1 Eng. Rep. 101. It is reasonable there should be a power to borrow without rendering the company liable to actions. Sects. 51 and 52 give actions only after demand in writing, and a lapse of six months and thirty days. There is no allegation of the lapse of six months and thirty days, and the allegation of demand would be satisfied by proof of a verbal demand. *Kinning v. Buchanan*, 8 C. B. 271. The proper remedy in such a case as this is for the mortgagees to go to a

enacted, that if such principal money and interest be not paid within six months after the same has become payable, and demand thereof in writing, the mortgagee or bond creditor may sue for the same in any of the superior courts of law or equity; or, if his debt amount to the sum of 5,000*l.*, he may alone, or, if his debt does not amount to the sum of 5,000*l.*, he may in conjunction with other mortgagees or bond creditors whose debts, being so in arrear after demand as aforesaid, shall, together with his, amount to the sum of 10,000*l.*, require the appointment of a receiver, by an application to be made as hereinafter provided."

court of equity to enforce their specific lien, as the proper tribunal for adjusting the rights of the parties. *Pontet v. The Basingstoke Canal Company*, 3 Bing. N. C., 433; *Pardoe v. Price*, 11 M. & W. 427; 13 M. & W. 267; 16 M. & W. 451; *Doe v. The St. Helen's Railway Company*, 2 Q. B. 364; *Doe v. Lediard*, 4 B. & Ad. 137. It has been decided that there is no right of action against companies or trustees who mortgage tolls or profits of an undertaking. The statute 7 & 8 Vict. c. 85, is repealed, but it is necessary to consider its provisions, because the Court of Exchequer relied upon it. The stat. 10 & 11 Vict. c. 174, is the repealing act; and if it does not alter the former act, then the six months and demand in writing are necessary. If it does, then the right of action is taken away absolutely, except for interest, and a right is given of appointing a receiver for the principal only. It may well be, that on the amalgamation the creditors agreed to give up all right of action for the larger sum, namely, the principal, and to look to the undertaking itself.

[WILLIAMS, J. Suppose, under the 43d section, the interest is paid, and the creditor wants the principal, how is he to get it? The appointment of a receiver seems to be made dependent upon the interest being unpaid.]

The section is inartificially drawn. It may be that the debt is to be irredeemable as long as the interest is paid.

[WIGHTMAN, J. Stat. 10 & 11 Vict. c. 225, though passed after the 10 & 11 Vict. c. 174, does not refer to it, but only to the 8 & 9 Vict. c. 94, which again refers to the 7 & 8 Vict. c. 85.]

Probably because the 10 & 11 Vict. c. 174, was conditional, and to come into force only upon a certificate being granted. The certificate was not given until after this mortgage, and after the passing of both acts of parliament.

[WIGHTMAN, J. Then the 10 & 11 Vict. c. 174, has no operation upon this question.]

That is so. The question, in fact, turns chiefly on sects. 51 and 52 of stat. 7 & 8 Vict. c. 85. The section of the Companies Clauses Consolidation Act therein referred to was inserted, not to give a right of action, but to prevent it from being taken away where it had been already given. That act applies, not only to railway companies but to other companies, which may have very different powers as to borrowing money.

Mellish, for the defendants in error. The instrument, looked at with reference to the acts of parliament, amounts to a covenant to pay the money on the day therein named. It is not disputed that the company can enter into such contracts only as they are empowered to execute by their acts; but it cannot be denied that they had power to put the common seal to this instrument; and the question is, what is its construction? *Prima facie* a right of action is given, as that would be the natural operation of the instrument. It would be a kind of trap to the creditor if it were otherwise. It is true, the legislature may use words in a non-natural sense, but that is not to be presumed.

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[WIGHTMAN, J. The 7 & 8 Vict. c. 85, may be said to be the regulating statute; and though it is repealed, yet it is in force for certain purposes.]

The section relied upon in that act by the defendants in error is the 49th. Here is an instrument in the form given by the legislature, and a section of the act declaring, that if a time is fixed for payment, (as it is here,) the amount shall be paid. It is unreasonable that the company should have an option of paying on the day named or at the expiration of six months. They would then decide according to the prevailing rate of interest, and it would be a great inconvenience to creditors. The true construction of sects. 49, 51, and 52 is, that the creditor may sue at the expiration of the time fixed by the instrument for payment, and if it is not paid within six months he may have a receiver appointed. Sects. 50 to 53 of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, correspond with sects. 49 to 52 of this local act, and they ought to be construed in the same way, as giving a right to the appointment of a receiver, without prejudice to the right of action, as expressly stated in the general act. The right of bond and of mortgage creditors is the same. In the schedule of the local act the form of bond is that of an ordinary money bond, payable on a day certain. It is the same as the form in the Companies Clauses Consolidation Act. There is no other remedy than by action and appointment of a receiver. In *Doe v. The St. Helen's Railway Company* it was held, that no property passed so as to enable the mortgagee to bring ejectment. The mortgage of the undertaking means mortgage of the profits of the undertaking, and gives only a right to the receipt of sums of money, not giving mortgage creditors any preference over bond creditors. In *Pontet v. The Basingstoke Canal Company* not any of the grounds on which the defendants in error rely are to be found. The appointment of a receiver for a railway is very different from that of a receiver for a canal. In the latter case he would only supersede the toll-collector; in the former there would be great difficulty, on account of the different stations and branch lines. It clearly appears from the declaration that the action was not brought until after six months had elapsed; but, in fact, that is not necessary. The averment as to the demand is, that it was made "in pursuance of the statutes," and that, on general demurrer, would be sufficient.

Willes, in reply. The proper way of considering these instruments is to expand them, and to look at them as if the conditions contained in the acts of parliament were incorporated in them. The allegation of demand is insufficient. *Everard v. Paterson*, 2 Marsh. 304.

Our. adv. vult.

June 1. COLERIDGE, J., now delivered judgment. This case was argued during the last vacation. The question in substance is, whether on the declaration, with the instrument declared on or imported into it on oyer, the action is maintainable against the East-

ern Union Railway Company. We are of opinion in the affirmative, and consequently the judgment of the court below must be affirmed. It was not denied by the counsel for the plaintiffs in error that the instrument itself, on its face, apart from all considerations of its validity, imported a covenant by the company for repayment of the money advanced, upon a day therein named for the purpose; nor that, apart from such consideration, the action would be maintainable.

But it was contended, in the first place, that the company, unless enabled by specific statutory provisions, could not bind themselves by any such covenant as this instrument imports, so as to give a right of action; secondly, that not only were there no such enabling clauses in the statutes relied on by the plaintiffs, but that these statutes give other specific remedies for the recovery of the money advanced, to which alone recourse can be had; and, thirdly, it was contended, that even if an action could be maintained at all, it could only be after demand in writing, of which there was no sufficient allegation in the declaration. Now, we are clearly of opinion, that where a corporation is created for certain purposes, with power to sue and to be sued, and to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment, if money be so borrowed and so secured, an action may be maintained against the corporation on a breach of the covenant. This appears to us a necessary inference from the premises just stated; and as all these premises concur in the present case, this is enough, without a more specific examination of the sections of the various statutes, to dispose of the first point made by the plaintiffs in error—a point undoubtedly not very earnestly insisted on by their counsel.

The second point will require a more detailed examination of the several statutes referred to in the argument. By the mortgage, it appears that the money in question was borrowed under the powers conferred by the 10 & 11 Vict. c. 225. The money borrowed under that act is, by the 7th section, borrowed under the same or the like provisions as are contained in the 8 & 9 Vict. c. 94. This act, in sect. 6, enables the company therein named to borrow on mortgage or bond, and for securing the repayment of the mortgage money, to mortgage the undertaking, as authorized by the 7 & 8 Vict. c. 85. To this act, therefore, we must look; and though, by the 10 & 11 Vict. c. 174, it is for general purposes repealed, yet for the purposes of our present inquiry it is in full force. The 37th section of this act gives power to borrow, and secure repayment by mortgage of the railway and future calls. The 49th section enables the company to fix the period for the repayment of the principal and interest, and in such case they are to cause a period to be inserted in the mortgage deed, as they have done here, on the expiration of which period it is enacted that the principal and the arrears of interest shall be paid to the party entitled to the mortgage. It being undisputed that the money in question was borrowed under such circumstances in all respects as satisfied the conditions imposed by the legislature, and that the instrument of security is in the form prescribed, it is clear, if the statute

had stopped here, that an action might have been maintainable ; and this is very important in determining the construction of the sections to which we are now coming, and on which has arisen whatever difficulty has been felt by any member of the court in the decision of this case.

The plaintiffs in error contend that these, and these alone, give any right of action, and upon a condition which has not been complied with. The defendants in error maintain that they give no right of action, but only recognize the preëxisting right, and add thereto another specific remedy, at the option of the borrower. These sections (51 and 52), which may be read as one, commence with this preamble — “ In order to provide for the recovery of the arrears of interest and costs, or of the principal, interest, and costs, of any such mortgage or bond, at the respective times at which such principal, interest, and costs become due.” And the 52d section, as to principal and interest and costs, enacts, “ that if such principal money and interest be not paid within six months after the same have become payable, and after demand thereof in writing, the mortgagee or bond creditor may sue for the same in any of the superior courts of law or equity ; or, if his debt amount to the sum of 5,000*l.*, he may alone, or, if his debt does not amount to 5,000*l.*, he may in conjunction with other mortgagees or bond creditors whose debts, being so in arrear after demand as aforesaid, shall, together with his, amount to 10,000*l.*, require the appointment of a receiver,” &c. The 51st section had previously provided, that if the interest shall remain unpaid for thirty days after it shall have become due, and demand thereof shall be made in writing, the mortgagee or bond creditor may either sue in an action of debt, or may require the appointment of a receiver.

Now, as to both principal and interest, the 49th section, as we have just seen, provided that they should be paid at the expiration of the period, on a day named in the instrument of security. If, therefore, we hold that the expiration of six months in one case, and thirty days in the other, after such period, are conditions precedent to any right to recover by action, either we make the sections inconsistent, or we must suppose a mere right has been declared by the former section — that is, a right to repayment, on a day named for the purpose, by the debtor — but no remedy to enforce it given until the thirty days, or six months later, with a superadded condition of a demand in writing. This, in itself, would be unreasonable ; and the more so, because these terms certainly do not apply to the company, which is left at liberty to pay at a day named ; at all events, a liberty, which, considering how often such loans are made by way of investment, and how the value of money fluctuates in short periods of time, will, in many supposable cases, operate very inconveniently to the lender. Moreover, if we give this construction to the 49th section, we must do the same to the 56th, which provides for cases where no time has been fixed in the mortgage deed or bond for the repayment of the money, and enacts, that the lender may, at the expiration of, or at any time after the expiration of, twelve months from the date of the

mortgage, deed or bond, demand payment of the principal, with all arrears of interest, on giving six months' previous notice for that purpose. It would be strange to hold, that when, by six months' notice, the money, under this section, would become payable at the end of twelve months, still that no action could be maintained till after six months' further default and demand in writing; yet this must be the consequence if we hold the right of action is given by the 51st and 52d sections only. But this construction, which involves such difficulty, is not a necessary one. All the enacting words of both would receive a full and satisfactory meaning if we suppose them to provide only specifically for the case of default for thirty days or six months respectively after demand made in writing, and in either of these specified cases to enact that the company would be subject, not only to an action, but, at an option of the lender, to have a receiver put upon them—an arrangement which, whether advantageous or not to the lender, could not but be highly inconvenient to them.

We agree with the court below in thinking that this is the true construction of these sections, and it has the advantage of making them agree with the corresponding sections of the Companies Clauses Consolidation Act, the 8 & 9 Vict. c. 16, ss. 50, 51, 52, 53, which provide for the repayment of money borrowed at interest, where a time has been fixed, and where no time has been fixed in the instrument, and the last of which expressly gives a right to require the appointment of a receiver after thirty days' or six months' default, as the case may be, and after demand in writing, without prejudice to the right to sue. The conclusion to which we have been thus brought on this point makes it unnecessary to consider whether the demand in writing is sufficiently alleged; and we are therefore of opinion that the decision of the Court of Exchequer ought to be affirmed.

Judgment affirmed.

CROWN CASES

RESERVED FOR THE CONSIDERATION AND DECISION

OF THE

COURT OF CRIMINAL APPEAL;

DURING THE YEAR 1852.

REGINA v. RILEY.¹

January 22, 1853.

Larceny — Trespass.

Where a man drove away a flock of lambs from a field, and in doing so, inadvertently drove away along with them a lamb, the property of another person, and, as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it:—

Held, that as the act of driving the lamb from the field, in the first instance, was a trespass, as soon as he appropriated the lamb to his own use, the trespass became a felony.

At the general quarter sessions of the peace for the county of Durham, held at the city of Durham, before Rowland Burdon, Esq., chairman, on the 18th October, 1852, the prisoner was indicted for having, on the 5th October, 1852, stolen a lamb, the property of John Burnside. The prisoner pleaded not guilty. On the trial it was proved that on Friday, the 1st October, 1852, John Burnside, the prosecutor, put ten white-faced lambs into a field in the occupation of John Clarke, situated near to the town of Darlington. On Monday, the 4th October, the prisoner went with a flock of twenty-nine black-faced lambs to John Clarke, and asked if he might put them into Clarke's field for a night's keep, and upon Clarke agreeing to allow him to do so for one penny per head, the prisoner put his twenty-nine lambs into the same field with the prosecutor's lambs. At half-past seven o'clock in the morning of Tuesday, the 5th October, the prosecutor went to Clarke's field, and in counting his lambs he missed one, and the prisoner's lambs were gone from the field also. Between

¹ 17 Jur. 189; 22 Law J. Rep. (N. S.) M. C. 48; 1 Pearce C. C. 149. Before POLLOCK, C. B., PARKE, B., WILLIAMS, TALFOURD, and CROMPTON, JJ.

eight and nine o'clock in the morning of the same day, the prisoner came to the farm of John Calvert, at Middleton St. George, six miles east from Darlington, and asked him to buy twenty-nine lambs, Calvert agreed to do so, and to give 8s. apiece for them. Calvert then proceeded to count the lambs, and informed the prisoner that there were thirty, instead of twenty-nine, in the flock, and pointed out to him a white-faced lamb, upon which the prisoner said, "If you object to take thirty, I will draw one." Calvert, however, bought the whole of them, and paid the prisoner 12l. for them. One of the lambs sold to Calvert was identified by the prosecutor as his property, and as the lamb missed by him from Clarke's field. It was a half-bred white-faced lamb, marked with the letter "T," and similar to the other nine of the prosecutor's lambs. The twenty-nine lambs belonging to the prisoner were black-faced lambs. On the 5th October, in the afternoon, the prisoner stated to two of the witnesses that he never had put his lambs into Clarke's field, and had sold them on the previous afternoon for 11l. 12s. to a person on the Barnard Castle road, which road leads west from Darlington. There was evidence in the case to show that the prisoner must have taken the lambs from Clarke's field early in the morning, which was thick and rainy. It was argued by the counsel for the prisoner, in his address to the jury, that the facts showed that the original taking from Clarke's field was by mistake; and if the jury were of that opinion, then, as the original taking was not done *animo furandi*, the subsequent appropriation would not make it a larceny, and the prisoner must be acquitted. The chairman, in summing up, told the jury, that though they might be of opinion that the prisoner did not know that the lamb was in his flock until it was pointed out to him by Calvert, he should rule that, in point of law, the taking occurred when it was so pointed out to the prisoner, and sold by him to Calvert, and not at the time of leaving the field. The jury returned the following verdict:—"The jury say, that at the time of leaving the field, the prisoner did not know that the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him." The prisoner was then sentenced to six months' hard labor in the house of correction at Durham, and being unable to find bail, was thereupon committed to prison until the opinion of this court could be taken upon the question, whether Charles Riley was properly convicted of larceny.

A. Liddell now appeared for the prisoner. Here the prisoner had the lamb in his possession before the time of the alleged taking.

[POLLOCK, C. B. What do you mean by the term "possession?"]

Such a possession as would have enabled him to maintain trespass. If it be said that the prisoner took the lamb when it was pointed out to him on the road, then the jury have not found that he knew, or had the means of knowing, at the time, who the true owner was. The lamb was, in fact, *animal vagrans*, without an owner, and within the rule laid down by Parke, B., in *Regina v. Thurborn*, 1 Den. C. C. 388. It was without an owner. It had no mark upon it to indicate the owner's name, for it was marked "T," while the initial of the prose-

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cutor's name was B. It was an estray, to take which at common law was no larceny. The law, in cases of taking by mistake, is stated in 1 Hale's P. C. 505. "If the sheep of A stray from his flock to the flock of B, and B drive them along with his own flock, and by mistake, and without knowing it, or taking heed of the difference, shear them, it is no felony. But if B knew them to be the sheep of another person, and tried to conceal the fact,—if for instance, finding another's mark upon them, he defaced it, and put his own mark upon them—this would be evidence of a felony." When, then, was the felony committed here? Was it when the lamb left the possession of the true owner? It is submitted that the question here is, what was the prisoner's intent when the lamb left the field? His subsequent conduct is only evidence of that intent. The question was left in this way to the jury in a case very similar to the present, by Cresswell, J. *Regina v. Cook*, 2 Russ. Cr. 12. That learned judge told the jury, "that if a person find an animal straying on the road, and take it with intent to dispose of it to his own use, it is larceny; and that the question for their consideration was, whether the prisoner so took the ewe and lamb, or whether they got mixed with the sheep he was driving, and he took them away by mistake." That case seems on all-fours with this. The question here ought to have been left to the jury whether the lamb got mixed with the prisoner's flock by mistake, or whether he had a felonious intent when it first came into his possession. It cannot be said that there was no *aspportavit*. If the lamb had strayed, and mixed with the lambs of the prisoner, he would be in the innocent possession of it while he drove it six miles along the road, and then the rule laid down in *Thistle's case*, 1 Den. C. C. 501, would apply. The chairman, by his direction to the jury, created a new state of facts inconsistent with the facts before the jury. A man meets a lamb on the road astray, and sells it, it being without an owner; which facts do not in law amount to larceny. Is not this like the case where the prisoner had possession of a chattel dispunishably?

[PARKE, B. No; that was not a case of trespass; that was a case where trover might have been maintained—where the chattel was found, and the person who found it had a good title against all the world.]

In *Preston's case*, 8 Eng. Rep. 589, where a bank-note was lost, and found by the prisoner, it was held that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind or resolution to appropriate it to his own use would amount to larceny. [In conclusion, he cited *Leigh's case*, 2 East's P. C. 694.]

Grey, for the prosecution, was not called on.

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POLLOCK, C. B. We are all of opinion that the conviction is right. The distinction between this and the case of *Regina v. Thistle*, 1 Den. C. C. 502, is this — if a man rightfully gets possession of an article without any intention at the time of stealing it, and afterwards misappropriates it, the law holds it not to be a felony. In the case of *Regina v. Thurborn*, 1 Den. C. C. 388, where Parke, B., delivered the considered judgment of the judges, it was ruled, that “if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with the intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is no larceny; but if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.” It may reasonably be said not to be a violation of any social duty for a man, who finds a lost article to take it home for the purpose of finding out the true owner; and if he does this honestly in the first instance, and afterwards, though he may have discovered the true owner, is seduced into appropriating it to his own use, he is not guilty of larceny, though he does wrong. So, in *Leigh's case*, 2 East's P. C. 694, it appeared that the prosecutor's house was on fire, and the prisoner assisted in saving some of his goods, and took some of them home to her lodgings, but next morning denied that she had them in her possession. She was found guilty; but the judges — as it appeared she originally took the goods merely from a desire of saving them for, and returning them to, the prosecutor, and that she had no evil intention till afterwards — held that the conviction was wrong. In all these cases the original possession was not wrongful. But in the case now before the court, the prisoner's possession of the lamb was from the beginning wrongful. The distinction between the cases is this — if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then, *animo furandi*, he disposes of the chattel, it is larceny.

PARKE, B. Here the original taking was not lawful; the prisoner being originally a trespasser, he continued a trespasser all along, just as at common law a trespass began in one county, continued in another; and being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent, that becomes a felonious trespass. *Leigh's case* was altogether a different one from the present.

Conviction affirmed.

Regina v. Manning and Smith.

REGINA v. MANNING and SMITH.¹

November 13, 1852.

Larceny — Accessory before the Fact.

The prisoner M. had the charge of the prosecutor's warehouse, in which bags were kept; the prisoner S; for some years had been in the habit of supplying the prosecutor with bags, which were usually placed outside the warehouse, and shortly after so leaving them, either S. or his wife called and received payment for them. The prisoner M. went into his master's warehouse, and clandestinely removed twenty-four bags which had been marked by his master, and placed them outside the warehouse, in the place where S. used to deposit the bags before payment for them. Soon afterwards the wife of S. came and claimed payment for the said twenty-four bags. The prosecutor then sent for the prisoner S., who, upon being asked respecting the twenty-four bags, said they had been placed there an hour previously by him, and demanded payment for them. The jury found that the bags had been so removed in pursuance of a previous arrangement between the prisoners:—

Held, that M. was rightly convicted of larceny, and that S. was an accessory before the fact to the larceny.

MICHAEL MANNING and John Smith were tried before R. B. Armstrong, Esq., recorder of Manchester, at the Manchester borough sessions, on the 5th August, 1852, for stealing, on the 17th July, twenty-four bags, the property of John Sheridan. The prosecutor was a potato dealer, and used bags in that trade, and he also dealt largely in bags, which he bought and sold. The prisoner, Manning, had been for several years in the prosecutor's service, and had the care of his warehouse, in which the bags were kept. The prisoner Smith had for five years regularly supplied the prosecutor with bags, which he made, and, from time to time, when he had finished a lot, his custom was to take them and put them down at the warehouse door of the prosecutor, outside the warehouse, and very shortly after any bags had been so left by him, either he or his wife, but generally his wife, used to come and receive payment for them from the prosecutor. On the night of the 16th of July the prosecutor had a quantity of bags in his warehouse marked. On the morning of the 17th July the prisoner Manning went into his master's warehouse and brought out twenty-four of the bags which had been so marked by his master on the previous night, and put them down outside the warehouse by the door, at the place where Smith used to deposit the bags he brought for the prosecutor, and for which had to be paid. Shortly after Manning had brought the prosecutor's bags out of his warehouse, and so placed them at the door, Smith's wife came and asked for payment for them, as for bags that her husband had brought there that morning. Upon this Smith was sent for, and was told what his wife had said; and the bags, which were then lying where Manning had placed them, were pointed out to him, and he was asked whether he had brought those bags there. He said, "Yes; he had brought them

¹ 17 Jur. 28; 22 Law J. Rep. (N. S.) M. C. 217; 1 Pearce C. C. 21. Before Jervis, C. J., COLERIDGE, J., ALDERSON, B., CRESSWELL, J., and PLATT, B.

Regina v. Povey.

there an hour before, and that he and his wife had been working at them till twelve o'clock the night before, in order to finish them." "Nay," said the prosecutor, "those bags are mine." "Yes," replied Smith, "they will be yours when you have paid for them." Upon this the prosecutor pointed to the two prisoners (Manning being then also present) the marks that had been put upon the bags the night before, when they both turned the color of this, (holding up a piece of red blotting paper,) and they were given into custody. The learned recorder told the jury, that if they were satisfied that Manning brought his master's bags out of the warehouse and placed them outside by the door, in the manner stated, for the purpose of enabling Smith to receive payment for them from his master, and with the intent that he should do so as if they had been new bags just then furnished by Smith, and for which he would be entitled to be paid, that would be larceny; and that if they were satisfied that this had been so done by Manning, in pursuance of previous concert and arrangement between him and Smith, Smith, though absent when the bags were so removed out of the warehouse, would be an accessory before the fact to the felony. The jury said they were satisfied that the bags had been so removed out of the warehouse by Manning, for the purpose and with the intent aforesaid, and that the same had been done in pursuance of a previous arrangement between him and Smith, and they found both the prisoners guilty. The question for the opinion of the court was, whether the facts stated and found amounted to larceny.

Cross, for the prosecution, was stopped by the court.

Per Curiam. The direction of the recorder was quite right; both the prisoners were properly convicted — Manning of larceny, and Smith as an accessory before the fact. The case of *Regina v. Hall*, 1 Den. C. C. 381; 13 Jur. 87,¹ is expressly in point.

Conviction affirmed.

REGINA v. POVEY.²

November 13, 1852.

Proof of Marriage — Law of Scotland.

On a trial for bigamy, a woman was called as a witness, who stated that she was present at a ceremony performed in a private house in Scotland, by a minister of some religious deno-

¹ See also *Regina v. Holloway*, 13 Jur. 86, and Arch. Cr. Pl., "Evidence and Practice," by Welsby, (12th ed.) 265.

² 17 Jur. 119; 22 Law J. Rep. (N. S.) M. C. 19; 1 Pearce, C. C. 82. Before JERVIS, C. J., COLERIDGE, J., ALDERSON, B., CRESSWELL, J., and PLATT, B.

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mination; that she herself was married in the same way, and that parties always married in Scotland in private houses:—

Held, that she was not a competent witness to prove the law of Scotland as to marriage, and that her evidence did not prove the fact of a marriage.

At a general session of gaol delivery, holden for the jurisdiction of the Central Criminal Court, on Monday, the 25th of November, 1852, William Povey was tried before the Common Sergeant, on an indictment charging him with having, at the parish of St. Cuthbert, Edinburgh, in that part of Great Britain called Scotland, feloniously married one Isabella Graham during the life of Jane, his wife. To prove the marriage in Scotland, a witness was called, who stated that she (being the sister of Isabella Graham above named) was present at a ceremony performed by a minister of a congregation (but whether of the kirk she did not know), in the private house of the witness in Edinburgh; that the witness herself was married in the same way, and that parties always married in Scotland in private houses; that the prisoner and her sister lived together in the witness's house as man and wife for a few days after the ceremony, and then left for England. It was contended on behalf of the prisoner, that better evidence of the validity of the second marriage, according to the law of Scotland, should have been given, and that some person sufficiently conversant with that law should have been called to prove that it was a legal and valid marriage. The learned judge, however, left it to the jury to find the prisoner guilty if they would presume, from the facts proved, a marriage valid by the law of Scotland. The jury found him guilty. It appearing to the learned judge, however, that the point raised on the trial was one of doubt, and entitled to consideration, he postponed judgment, and committed the person to the custody of the keeper of the gaol of Newgate until the next session, in order that the opinion of the judges might be taken, whether the evidence given was sufficient to justify the finding of the jury, or whether some witness conversant with the law of Scotland should have been called to say whether the facts proved constituted a valid marriage according to that law.

Parry now appeared for the prisoner. It was necessary, in cases of alleged bigamy, to prove an actual marriage; and then, in the case of a marriage celebrated in a foreign country, some witness or witnesses should be called who were conversant with the law of that country, to show that the marriage so celebrated was a valid marriage. In *Morris v. Miller*, 4 Burr. 2057, it was expressly held, that a marriage in fact must be proved, though in civil cases, for many purposes, the fact that parties lived together as man and wife may be considered to amount to sufficient *prima facie* evidence of marriage. But here, conceding that the witness spoke to certain facts that might be presumed to belong to the ceremony of marriage, she, not being skilled in the law of Scotland—and for the purpose of this argument Scotland was a foreign country—was unable to give any evidence as to whether the facts she spoke of as having taken place amounted to a valid and legal marriage. The facts having been

brought before the court, a witness, conversant with the law of Scotland, whether professionally or otherwise,*should have been examined, in order to show whether these facts constituted a marriage. *Dalrymple v. Dalrymple*, 2 Hagg. Consis. 54; *The Sussex Peerage case*, 11 Cl. & Fin. 85.

Robinson appeared for the prosecution. No professional witness was required to prove the requisites of a valid marriage; and the jury were justified, from the evidence given in the case, in inferring that an actual marriage had taken place. There was the ceremony, or at least what the parties themselves represented to be the ceremony of marriage, and that was followed by cohabitation. Besides, the conduct of the prisoner was a fit subject for the consideration of the jury. The Court of Common Pleas, in the case of *Vanderdonkt v. Thellusson*, 19 Law J. Rep. (N.S.) C. P., 12, decided that any person conversant with foreign law is a competent witness. There a person, who was a hotel-keeper in London, but had formerly been a merchant and stockbroker in Brussels, and who stated that he was acquainted with the law of Belgium concerning promissory notes and bills of exchange, was allowed to give evidence to prove that by the law of Belgium it was unnecessary to present a promissory note at the place where it was made payable in the body of the note. That case unquestionably shows that a professional person or agent is not the only witness that may be called to give evidence upon questions of foreign law. Practical knowledge was all that was necessary to give competency, and that the witness in this case possessed, as it appears that she stated all marriages in Scotland to be celebrated in private houses, and the ceremony of her own marriage was exactly similar to that of the alleged second marriage of the prisoner.

[COLERIDGE, J. The witness does not state that she is in any way acquainted with the law of Scotland, or able to say what that law is, upon the subject of marriage; and the mode in which the question is put to us, namely, whether some one conversant with that law ought not to have been called, assumes that.]

The prisoner, in representing himself by his conduct as a married man, and in representing the ceremony as a marriage, afforded sufficient evidence to justify the jury in coming to the conclusion they did. *Regina v. Simmonsto*, 1 Car. & K. 164. The declaration of the prisoner there, that he had been married to his first wife in New York, was considered proof of that marriage; here the prisoner's conduct in cohabitating with the woman after the ceremony, amounted, in fact, to the same thing.

PER CURIAM. The question reserved for the consideration of the court is, whether the evidence given at the trial was sufficient to justify the finding of the jury; and whether some witnesses conversant with the law of Scotland should not have been called by the prosecution to say whether the facts given in evidence constituted a valid marriage according to the law of that country. That question does not raise the point as to who is admissible as *peritus* — a point that

Regina v. Dale.

may be considered settled by *The Sussex Peerage case* — or what kind the witnesses called should be. There may be certain cases, perhaps, in which it may not be necessary to have a lawyer to give evidence; but the court is clearly of opinion that some witnesses conversant with the Scottish law of marriage should have been called on the part of the crown. With regard to the case before us, what the witness who was called says, even supposing her a competent witness in such a matter, does not amount to any proof of a marriage in fact.

Conviction quashed.

REGINA v. DALE.¹

November 13, 1852, and January 22, 1853.

Indictment for the Non-payment of a Penalty to the Treasurer of a County — Alehouse Act, 9 Geo. 4, c. 61 — Municipal Corporations — 5 & 6 Will. 4, c. 76.

A penalty imposed under the Alehouse Act, by justices for a borough which has a commission of the peace, but no Court of Quarter Sessions, is payable to the treasurer of the county in which such borough is situate, and not to the treasurer of the borough on account of the borough fund:—

Held, that the defendant was properly convicted upon an indictment for neglecting and refusing to pay over one moiety of a fine imposed under the 9 Geo. 4, c. 61, to the treasurer of the county of N.

At the last midsummer Quarter Sessions for the county of Northumberland, an indictment, of which the following is a copy of the first count, and an extract from the second, was found by the grand jury to be a true bill:—“Northumberland; to wit. The jurors of our lady, the queen, upon their oaths, present, that heretofore, to wit, on the 19th day of May, in the year of our Lord, 1851, in the borough of Tynemouth, in the county of Northumberland, one Joseph Gibbon was convicted before Alexander Bartleman and Solomon Mease, Esqs., then and there being two of her Majesty’s justices assigned to keep the peace in and throughout the said borough, in the said county, for that he, the said Joseph Gibbon, on the 13th day of May, in the year of our Lord 1851, at the township of North Shields, in the said borough of Tynemouth, he, the said Joseph Gibbon, being then and there an alehouse keeper, and duly licensed to sell excisable liquors by retail in his house and premises there situate, did wilfully permit disorderly conduct in his house and premises, by then and there suffering persons, to the number of twenty and more, to remain, fight-

¹ 17 Jur. 47; 22 Law J. Rep. (N. S.) M. C. 44; 1 Pearce C. C. 37. Before JERVIS, C. J., ALDERSON, B., COLERIDGE, J., CRESSWELL, J., PLATT, B., and MARTIN, B.

ing, drinking, and making a great noise and disturbance there, at a late hour in the night, to wit, at twelve o'clock at night, against the tenor of his said license and contrary to the form of the statute in such case made and provided. And the said Alexander Bartleman and Solomon Mease, in and by the said conviction, then and there adjudged the said Joseph Gibbon for his said offence to forfeit and pay the sum of 2*l.* 10*s.*, to be paid and applied according to law, and also to pay to Robert Mitchell, the complainant, the sum of 10*s.* for his costs in that behalf. And the said Alexander Bartleman and Solomon Mease did, by the said conviction, then and there order, that if the said several sums were not paid forthwith, the same should be levied by distress and sale of the goods and chattels of the said Joseph Gibbon; and in default of sufficient distress, the said Alexander Bartleman and Solomon Mease did, by the said conviction, then and there adjudge the said Joseph Gibbon to be imprisoned in the house of correction, at Morpeth, in the said county of Northumberland, there to be kept to hard labor for the space of one calendar month, unless the said several sums, and all the costs and charges of the said distress, and of the commitment and conveying of the said Joseph Gibbon to said house of correction, were sooner paid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Alexander Bartleman and Solomon Mease did, at the time of making the said conviction, award one moiety of the said penalty to the use of the said Robert Mitchell, the said complainant, and the prosecutor of the said Joseph Gibbon for the said offence. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Gibbon did thereupon, afterwards, to wit, on the day and year first aforesaid, pay the said sum of 2*l.* 10*s.* to one Henry Dale, late of the borough aforesaid, in the county aforesaid, gentleman, and who then was, and still is, clerk of her Majesty's said justices assigned to keep the peace of our lady the queen in, for, and throughout the said borough, and the said sum of 2*l.* 10*s.* was so paid to the said Henry Dale, and he then received the same as such clerk as aforesaid, and for the purpose and in order that it should forthwith be paid by him to the parties to whom the same was to be paid, in pursuance of and according to the said conviction, and the statutes in such case made and provided, to wit, one moiety to the said Robert Mitchell, as such prosecutor as aforesaid, and the remainder to the treasurer of the said county. And the jurors aforesaid, on their oath aforesaid, do further present, that the justices of our said lady the queen, assigned to keep the peace of our said lady the queen, in and throughout the said borough were, at the time of making the said conviction, and thence hitherto have been, acting and empowered to act within the said borough, by and under a commission of the peace from our lady the queen, which said commission did not nor does contain any grant of a court of quarter sessions of the peace for the said borough; and our said lady the queen, had not then, or at any time since, granted that a separate court of quarter sessions of the peace should be holden in and for the said borough, nor were there then or at any other time, any separate general or quarter sessions of the peace holden in or for the same. And

the jurors aforesaid, on their oath aforesaid, do further present, that after the said sum of 2*l.* 10*s.* was so paid to Henry Dale as aforesaid, it became and was his duty to pay one moiety of the said sum of 2*l.* 10*s.* to one William Fenwick Blackett, Esq., who, at the time of the making of the said conviction, was, and from thence hitherto hath been, and still is treasurer of the said county of Northumberland, according to law and to the statutes in that case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Henry Dale, well knowing the premises, although a reasonable time for his paying the said moiety of the said sum of 2*l.* 10*s.* to the said treasurer had elapsed long before the day of taking of this inquisition, and although the said treasurer hath at all times been ready and willing to receive and give him a receipt for the same, hath yet hitherto unlawfully and contemptuously neglected and refused to pay, and still neglects and refuses to pay, the said moiety of the said sum of 2*l.* 10*s.*, or any part thereof, to the said treasurer; and he wrongfully and unlawfully detains the same, and every part thereof, from him, contrary to his duty in that behalf, against the form of the statutes in that case made and provided, and against the peace of our lady the queen, her crown and dignity." There was a second count in the indictment, the same as the first, word for word, with this addition:—"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Alexander Bartleman and Solomon Mease, in the making of the said conviction, acted as such justices as aforesaid for the said county." The usual process for that purpose having been issued, the defendant entered into a recognizance to appear at the next quarter sessions to try and answer to the said indictment.

At the Michaelmas Quarter Sessions, held on the 20th October, 1852, the said indictment was tried, and the jury found the defendant guilty. Whether the defendant is guilty or not guilty depends upon the construction which may be put upon the public acts of parliament relating to this question, and which formed part of this case. The borough of Tynemouth was incorporated by royal charter, dated the 6th August, 1849, and a commission of the peace was granted to certain persons therein named, dated the 26th March, 1850, but no court of quarter sessions was thereby granted. It was admitted for the purposes of this case, that the defendant has paid over the moiety of the said fine to the treasurer of the borough of Tynemouth. Upon this, counsel for the defendant moved in arrest of judgment, contending, that upon the true construction of the statutes he had duly discharged himself by paying over the money to the treasurer of the borough of Tynemouth. On the other hand, counsel for the prosecution contended that he had not discharged himself, as it was his duty to pay the moiety of the said fine to the treasurer of the county of Northumberland, the borough of Tynemouth being part and parcel of the county, and there being no grant of a court of quarter sessions to that borough. Accordingly no judgment was passed, and the court postponed all further proceedings to the next sessions, and granted a case for the opinion of the justices of either

bench, or the barons of the exchequer, under the statute. The question for the opinion of the court was, whether the defendant was properly found guilty upon the indictment for neglecting and refusing to pay over one moiety of the said fine to the treasurer of the said county of Northumberland.

Pashley, Q. C., for the defendant, cited the 9 Geo. 4, c. 61, s. 26; the 5 & 6 Will. 4, c. 76; the 11 & 12 Vict. c. 43, s. 31; and the 13 & 14 Vict. c. 91, s. 91; and, upon a review of all these statutes, contended that the penalty was payable to the treasurer of the borough.

Otter, for the prosecution, contra, referred to *Rex v. Amos*, 2 B. & Al. 533; *Regina v. Wells*, 11 Q. B. 758; and *Regina v. Saintsbury*, 4 T. R. 451.

Curr. adv. vult.

Pashley replied.

Jan. 22. JERVIS, C. J., now delivered the judgment of the court. Whether the defendant is guilty or not guilty in this case depends upon the construction of the 9 Geo. 4, c. 61; and we are of opinion, that, upon the proper construction of that statute, the defendant is guilty, and was properly convicted. The penalty, for the non-payment of which to the treasurer of the county of Northumberland the defendant has been convicted, was in this case imposed under the Alehouse Act, 9 Geo. 4, c. 61, by justices acting for the borough of Tynemouth, which has a commission of the peace, but no court of quarter sessions; and the question is, whether that penalty ought to be paid to the treasurer of the county, or to the treasurer of the borough on account of the borough fund. By the 26th section of the Alehouse Act, so much of the penalty as is not awarded to the prosecutor is to be paid to the treasurer of the "county or place" for which the justice was acting when the penalty was imposed. The defendant's counsel contends that the word "place" must be understood in its ordinary sense, and that, inasmuch as the justices were acting for the borough of Tynemouth when the penalty was imposed, the treasurer of that borough is the person who ought to receive the penalty, and that it ought to be applied to the borough fund, under the provisions of the stat. 5 & 6 Will. 4, c. 75, s. 126. On the other hand, the prosecutor asserts that the word "place," as used in that section, means a place for which a court of quarter sessions is held. This, we think, is the right construction. In many of the sections in which the words "county or place" are used, it is manifest that the latter word applies only to places where quarter sessions are held. For instance, by the 27th section, parties aggrieved may appeal to the next general or quarter sessions of the peace of the "county or place" wherein the cause of complaint arose; and, by the 33d section, the conviction is to be returned to the next general or quarter sessions of the peace of the "county or place" wherein the offence shall have been committed. The interpretation clause shows further

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that it was intended that these penalties should be applied towards the costs of public prosecutions, and not to a borough fund, because it explains the words, treasurer of a "county or place," to mean an officer acting in such capacity, or charged with the receipt and expenditure of moneys from and out of which the cost of public prosecutions have been usually defrayed. The person to receive the penalty is to be an officer acting in the capacity of treasurer of moneys for and out of which the costs of public prosecutions have been usually defrayed. In the same spirit the justices in quarter sessions are, by the 29th section, authorized to indemnify the justices from their costs upon an appeal in certain cases, and to order the treasurer of the "county or place" in and for which the justices acted, to pay the amount. At the time the Alehouse Act passed, corporations had private property, but no borough fund, properly so called, over which the legislature could, with justice, exercise a control. The treasurer of the place, meant in this section, must clearly be the treasurer of a place having a court of quarter sessions—an officer under the control of the justices making the order, with a fund under their control. It would be strange that the same words should give to one fund, the borough fund, all the penalties for good convictions, and charge upon another fund, the county rate, all the costs for convictions which could not be sustained. For these reasons we think the conviction right.

Conviction affirmed.

REGINA v. WILLIAM ION.¹

May 12, and 29, 1852.

Uttering Forged Receipt.

Where the prisoner placed a forged receipt, for poor rates, in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person:—

Held, that this was an uttering within 1 Will. 4, c. 66, s. 10.

At a sessions of Oyer and Terminer and Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, in December, 1851, William Ion was tried before the Right Hon. J. S. Wortley, Recorder of London, upon an indictment for feloniously uttering, disposing of, and putting off a forged receipt for 2l. 4s., knowing, &c., with intent to defraud.

It appeared in evidence that the prosecutor, James Dwyer, was a money lender; that one James Gillard had applied to him for a loan of money, and had proposed the prisoner as a surety for the amount. That thereupon the prosecutor proceeded to the house of the prisoner

¹ 2 Denison C. C. 475; 16 Jur. 746.

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for the purpose of satisfying himself as to the prisoner's responsibility, and with this object required the production of the prisoner's receipts in respect of that house. That the prisoner, with the view of causing the money to be advanced to Gillard (who was found to be a man of no responsibility) upon their joint security, produced to Dwyer and placed in his hands (but for the purpose of inspection only) three documents, purporting to be receipts for poor rates in respect of the said house, one of which was the forged receipt in question. The prosecutor inspected these documents, the prisoner remaining present during such inspection; he then received back the documents from the prosecutor and placed them upon a bill file. The foregoing facts comprised the uttering, disposing of, and putting off mentioned in the indictment.

It was objected upon the trial that these facts did not amount to an uttering, disposing of, or putting off sufficient to support the indictment.

The learned recorder, however, ruled the contrary, and as the other necessary facts were proved to the satisfaction of the jury, they found the prisoner guilty. The jury also found, expressly in answer to a question put to them, that the prisoner placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance the money to Gillard.

Considering it doubtful whether he was correct in his ruling, the learned recorder postponed judgment upon the indictment, and committed the prisoner to the gaol of Newgate, in order that the opinion and decision of the judges might be taken upon a case to be stated.

On the 24th April, A. D. 1852, this case was argued before JERVIS, C. J., ALDERSON, B., COLERIDGE, J., WIGHTMAN, J., and TALFOURD, J.

Parry, for the crown.

Metcalfe, for the prisoner.

It is submitted that this conviction is improper. The indictment charges the "uttering, disposing, and putting off" of a forged receipt. The evidence is, that the prisoner placed the receipt in the hands of Dwyer for inspection only. That is found in the case, and it cannot amount to either a "disposing of," or "putting off," which words imply that a person has parted with the document. It was held in *Rex v. Woolridge*, 1 Leach, 307, also in 1 East, P. C. 179, on an indictment under the repealed statute 8 & 9 Wm. 3, c. 26, that the putting off must be complete, and, therefore, where the defendant laid on a table a quantity of counterfeit shillings, for which he was to receive a certain sum, but while the counterfeit money was being counted, and before the prisoner received the price of it, he was apprehended, it was decided not to be within the act. The question, therefore, resolves itself in this, does the mere placing the receipt in the hands of another for the purpose of inspection, amount to an uttering? In *Rex v. Shukard*,¹ it was held, that showing a man an instrument, the

¹ The defendant was tried before Lord Ellenborough, at the summer assizes for
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uttering of which would be criminal, though with the intent of raising a false idea in him of the party's substance, was not an "uttering" or "publishing" within 13 Geo. 3, c. 79. Nor will the leaving it afterwards sealed up with the person, to whom it is shown, under cover, that he may take charge of it as being too valuable to be carried about, be an uttering or publishing. In the case of *Regina v. Radford*, 1 Den. C. C. 59, it was held, that showing a forged receipt to a person, with whom the defendant is claiming credit for it, is an uttering within the 1 Wm. 4, c. 66, s. 10, though the defendant refuse to part with the possession of it. But it is submitted that the present case is perfectly distinguishable from *Regina v. Radford*. There the document was exhibited as a receipt and acquittance for money by a person claiming credit, for having paid a sum of money which in fact he had not paid.

[CRESSWELL, J. By exhibiting the receipt he was seeking to relieve himself from the payment.

JERVIS, C. J. If this receipt had been produced to the collector of the poor rates, it would have been an uttering.]

Lewes, in the year 1811, for a misdemeanor, upon an indictment which charged him with having unlawfully, knowingly, and wilfully uttered and published a certain promissory note, containing the words "five hundred," expressing the sum of the said promissory note in white letters on a black ground, without being authorized or appointed for that purpose by the governor and company of the Bank of England: the note was set out as follows:—

"Bank of England, 1811.

"No. 43106.

No. 43106.

"I promise to pay Mr. James Jones, or bearer, on demand, the sum of five hundred pens. 1811.

"June 11. London.

11 June, 1811.

"For the Governor and Company of the Bank of England.

"RD. DENTON."

Against the form of the statute 13 Geo. 3, c. 79. The defendant was convicted. The point reserved for the opinion of the judges was, whether there was a sufficient uttering and publishing, in this case, of the note, answering in other respects the description of the act, as having white letters on a black ground?

The defendant had introduced himself to the acquaintance and family of a person of the same name, at Brighton, upon a fabricated story. And, in order to persuade the innkeeper that he was a man of substance, one day, after dinner, he pulled out a pocket-book and showed the innkeeper a five hundred and a fifty pound note of the above description, of which he only saw the sums and general form. The defendant said that he did not like to carry so much property about him, and desired the innkeeper to take care of them for him. The innkeeper took charge of them accordingly, and thought the defendant acted very prudently.

They were put in a cover and sealed up by the defendant himself; the witness, the innkeeper, received them from him in an envelope, which, after having kept for some time, upon some suspicions afterwards created by the conduct of the defendant, he broke open, and found them to contain the notes above mentioned.

In Michaelmas term, 1811, the judges held the conviction wrong, being of opinion that this did not amount to an uttering. That in order to make it an uttering they seemed to be of opinion that it should be parted with or tendered, or offered, or used in some way to get money or credit upon it. Russ. & Ry. 200.

If at the time he claimed to have paid the rate demanded.

[JERVIS, C. J. The prisoner produced the receipt for the purpose of showing that he owed no rates. If, in the case of justification of bail, a person had produced some bank notes to show that he was possessed of a sufficient amount of property, would not that amount to an uttering of the notes? Here the prisoner exhibits a receipt to show his solvency.

WIGHTMAN, J. Suppose the proposed bail were asked, in examination before the Judge at Chambers, "Have you paid all the rates due in respect of your house?" and he had said, "Yes, and I now produce the receipts," and he then produced for inspection, among others, one which was a forgery? — or, supposing a man proposes to borrow a sum of money, and, in order to satisfy the lender, who inquires, has he paid all his rates, he replies in the affirmative, and produces the receipts as proof of having paid them, what would you say to that case?]

In none of these cases is the party seeking to obtain money or credit on the document itself; and it was held in *Shukard's case*, that in order to make it an uttering, the document must be parted with, or tendered, or offered, or used in some way to get money or credit upon it. In *Radford's case*, the prisoner was seeking to absolve himself from payment, and if accounts had been balanced between the parties, an action for money had and received would have laid, as was held in *Gingell v. Purkins*, 4 Exch. Rep. 720; *Standish v. Ross*, 3 Exch. 527; overruling *Lee v. Merrett*, 8 Q. B. 820. But in the present case, no action for money had and received would lie. In *Radford's case*, Pollock, C. B., puts this supposition, — suppose a man showed a ticket in passing a toll bar, and passed on, would not that be an uttering? But that is not like the present case.

[WIGHTMAN, J. There the party would be claiming credit upon the instrument.]

The word uttering is defined in Webster's Dictionary, as "putting into currency."

[JERVIS, C. J. You say, that to constitute an uttering, the instrument must be offered to get money or credit upon it. The words of the statute, 11 Geo. 4 & 1 Wm. 4, c. 66, s. 10, are, if uttered "with intent to defraud."]

Lord Abinger, in *Regina v. Page*, 8 Car. & P. 122, held, that uttering counterfeit coin, without an intention to defraud, was not an offence within the statute.

[CRESSWELL, J. Suppose the prisoner, instead of the receipt, had exhibited a roll of forged bank notes, would not this, then, be like *Shukard's case*?]

Shukard's case seems directly in point.

Parry, for the crown.

Rex v. Shukard is a different case from the present. It is submitted that the principle which governs cases of uttering is, that if a person by word or deed represents a false document as a genuine one, with the intention of deceiving the party to whom he exhibits it, it is

an offence. The intent to deceive is a direct presumption of law. The prisoner does not produce the receipt out of bravado. He wants to obtain a sum of money, whether for himself or for another it is quite immaterial, and in order to obtain it, he exhibits the receipt. He, therefore, virtually obtains money by means of the forged receipt. The prosecutor, who is asked to lend his money, goes to the prisoner for the purpose of satisfying himself as to the prisoner's responsibility, and asks the prisoner whether he has paid his rates; he says, that he has paid them, and produces the receipt. If the prisoner had not shown the receipt, but had made this representation, and had obtained money thereby, would it not have been a false pretence? What is the difference between forgery and false pretences? One is verbal, the other documentary. Forgery, if translated, is making a false document.

[ALDERSON, B. The difference between obtaining money by false pretences and uttering is, that in false pretences, the offence consists in obtaining the money, while in uttering, the offence is the uttering.]

It is found in the case, that the prisoner put the documents into the prosecutor's hands. In *Shukard's case*, the prisoner merely allowed the prosecutor to see the words "five hundred" on the notes, and the prisoner himself then sealed up the notes in an envelope, and left them in the care of the prosecutor. The court in that case held, that to constitute an uttering the instrument must be offered with intent to obtain credit "upon it."

[ALDERSON, B. "Upon it," not by means of it.]

That case bears out the present argument. Here is a clear uttering for a specific purpose, — to raise money. Suppose the case of a pawn ticket, upon which money is very often raised by poor persons, a man desiring to obtain an advance, says to another, "I have goods in pledge," and shows him a forged ticket, and thus gets money upon it, it is submitted that that would, without doubt, be a case of uttering. Here the prisoner meant, by representing the receipts to be genuine, to raise money. It is contended on the part of the prisoner, that the document itself must be parted with, or used with intent to get money upon it.

[JERVIS, C. J. Have you looked at the words of the act of parliament, 13 Geo. 3, c. 79; no intent to defraud is necessary; the offence is the uttering and publishing; and the judges in *Shukard's case* held that there was no publication.]

ALDERSON, B. This is a stronger case. The stat. 11 Geo. 4, & 1 Wm. 4, c. 66, uses the words uttering, disposing of, or putting off.

CRESSWELL, J. The prisoner, by showing the receipt, did not obtain any benefit to himself.]

The prisoner and his friend were acting together.

[CRESSWELL, J. They may have been guilty of a conspiracy, or of obtaining money by false pretences, but the question is, is this an uttering?]

In *Rex v. Birkett*, R. & R. 86, where a forged bill of exchange, payable to the order of the defendant, was given as a pledge only, but

to obtain credit, it was held that there was a fraudulent intent within the meaning of the statute.

[CRESSWELL, J. There the defendant obtained credit. That case is just the same as if a banker asked a man for his securities, and he were to produce forged securities, and deposit them with the banker.]

Suppose that the money-lender, when the defendant exhibited the receipt, said, "Oh, yes, I see you have paid your rates, here is the 5*l*. you want," would not the case then have been an uttering?

[COLERIDGE, J. Suppose the prisoner had received the money-lender in another person's house, and had said "this is my house," what offence would that be?]

If he obtained no money then it would be a mere lie. But this is uttering a forged document.

[WIGHTMAN, J. To induce the prosecutor to part with his money to his loss.]

An intention to defraud is found in the case. In *Regina v. Cooke*, 8 Car. & P. 582, it was held that a conditional uttering was as much a crime as any other uttering. In *Rex v. Birkett*, R. & R. 86, Baron Graham said, that there might be an uttering, &c., though the document was valueless — as valueless as the receipt here.

[COLERIDGE, J. The statute 33 Hen. 8, c. 1, enacted "That if any person or persons shall falsely and deceitfully obtain or get into his hands or possession any money, goods, chattels, or jewels, or other things, of any other person or persons, by color and by means of any privy false token, or counterfeit letter, made in another man's name to a special friend or acquaintance, for the obtaining of money, &c., from such person, and shall be thereof convicted, &c., every such offender shall suffer punishment by imprisonment, setting upon the pillory, &c." This statute led to the statute of false pretences, 30 Geo. 2, c. 24; now, what would have been the offence of exhibiting this receipt in the manner specified in the case, before these statutes?]

Forgery at common law.

Metcalf replied.

[WIGHTMAN, J. There are three circumstances to be considered in this case. First, there is a false document; secondly, the uttering such document; and thirdly, the uttering, &c., to induce the prosecutor to give a person credit to his loss. In fact the prosecutor is defrauded.

COLERIDGE, J. The case does not state that money was actually given.

WIGHTMAN, J. Suppose he had been defrauded?

It is only found that the receipt was placed in the hands of the prosecutor for the purpose of inducing him to advance money to Gillard.

[CRESSWELL, J. To induce him to give credit to Gillard.

COLERIDGE, J. It is not found in the case that Gillard was insolvent.

JERVIS, C. J. The question for us is, was there an uttering, — was the recorder correct in ruling that the facts proved an uttering?

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WIGHTMAN, J. It is not necessary that money should be obtained on the instrument, but by means of it.]

In *Regina v. Page*, 8 Car. & P. 122, Lord Abinger decided that unless an intent to defraud was shown, a party could not be convicted.

[ALDERSON, B. That is overruled. The intent is inferred by law. If a forged instrument is put away in order to get money or credit, that amounts to an uttering.]

WIGHTMAN, J. I can understand the distinction between gaining an advantage directly upon the instrument, and of gaining an advantage indirectly by means of it. You must assume, from the facts, that there was an attempt to defraud by means of it.]

Metcalfe cited Webster's Dict. tit. "Uttering;" *U. S. v. Mitchell*; U. S. Dig. "Uttering;" *Regina v. Page*, 8 Car. & P. 122; *Rex v. Harris*, 7 C. & P. 428; *Regina v. Longhran*, Crawford & Dix, (Irish), 333; *Regina v. Wavell*, 1 Moo. 224.¹

Cur. adv. vult.

On the 12th May, A. D. 1852, this case was again argued before LORD CAMPBELL, C. J., POLLOCK, C. B., JERVIS, C. J., COLERIDGE, J., CRESSWELL, J., ERLE, J., TALFOURD, J., and CROMPTON, J.

Parry, for the crown.

Metcalfe, for the prisoner. The question turns on the true definition of the word "utter," as used in the statute. The words of the indictment are, "uttered, disposed of, and put off." The words of the statute under which the prisoner is indicted, 11 Geo. 4, and 1 Wm. 4, c. 66, s. 10, are, "shall offer, utter, dispose of or put off." The word "offer" is omitted from the indictment. It will hardly be contended on these facts that the documents in question were disposed of and put off. *Wooldridge's case*, 1 Leach, C. C. 307, is an authority to show that merely putting an article into the hands of another, where it was taken back, is not a disposing of or putting off.

[LORD CAMPBELL, C. J. Does not the case in Leach go so far as to decide that there can be no putting off without an intent to part with the instrument?]

Metcalfe referred to *Rex v. Varley*, 2 W. Bla. 632. See also 1 East, P. C. 164. To bring the case within the meaning of the word disposing of, it is not sufficient that the document is produced for the purposes of inspection only.

[LORD CAMPBELL, C. J. You say that in order to constitute a disposing of, the property must be parted with.]

At common law, uttering, *per se*, is no offence; per Cresswell, J., after consultation with Patteson, J. *Regina v. Boulton*, 2 Car. & Kir. 604. The first statute on the subject was 25 Edw. 3, s. 5, c. 2:—"And if a man bring false money into this realm, counterfeit to the money of England, as the money called Lushburg, or other like to

¹ See *post*, p. 564, 565.

the said money of England, knowing the money to be false, to merchandise, or make payments in deceit of our said lord the king and of his people —”

[LORD CAMPBELL, C. J. The word “utter” does not occur there.]

It does not. 1 & 2 Ph. & M. c. 11, recited, “Where, &c., many ill-disposed persons, &c., have brought into this realm, &c., forged and counterfeit money,” &c., and have “uttered the same here by merchandising and otherwise,” &c., and then enacted, “that if any person, &c., shall bring any such false and counterfeit coin or money, &c., knowing the same, &c., to be false and counterfeit, to the intent to utter or make payment with the same within this realm, &c., by merchandising or otherwise” (*i. e.* dealing, *ejusdem generis.*) 15 Geo. 2, c. 28, increasing the punishment for uttering money, contains these words: “If any, &c., shall, &c., utter or tender in payment,” &c. In 5 Eliz. c. 11, s. 2, 3, the first statute against forgery of private documents, the words were, “shall pronounce, publish, or give in evidence.” At the Revolution, paper currency commenced; 8 & 9 Wm. 3, c. 20, s. 36, was the first act providing for forgeries upon the Bank of England. 11 Geo. 1, c. 9, s. 6, was the first against uttering forged notes of the Bank of England. It recited that “and whereas of late divers frauds and deceits have been put upon the said governor and company of the Bank of England and other persons, by the uttering, forging, &c., and by the tendering in payment, uttering, vending, exchanging, and bartering of such altered, &c., bills, &c., to the prejudice of public credit and to the great hurt and diminution of trade and commerce. For redressing whereof for the future, be it enacted, &c., shall tender in payment, utter, vend, exchange, or barter.” In 2 Geo. 2, c. 25; 7 Geo. 2, c. 22; 18 Geo. 3, c. 18, the words were “utter or publish as true.” In 43 Geo. 3, c. 139, s. 1 (foreign bills), “tender in payment or in exchange, or otherwise utter or publish as true.”

[LORD CAMPBELL, C. J. The expression “tender in payment,” is there considered an uttering;—the words are, “or otherwise utter.”]

That is so. In 45 Geo. 3, c. 89, the words of the statute are, “offer, dispose of, or put away.” In 1 Wm. 4, c. 66, s. 10, the words are, “offer, utter, dispose of, or put off;” the law having been altered to meet *Wooldridge’s case* and others. Various definitions of the word “utter,” occur in the works of learned writers. Webster’s definition of it when used in this sense is as follows: 1, “To disclose, to discover, to divulge, to publish;” 2, “to sell, to vend, as to utter wares (this is obsolete unless in the law style);” 3, “to put or send into circulation, to put off as currency, or cause to pass in commerce, as to utter coin or notes—a man utters a false note who gives it in payment, knowing it to be false.” The following is Richardson’s definition: “To put out, to expel, to eject, to come, put or send forth, to vent, to emit, to produce publicly (metaphor), to speak, to tell, to pronounce, proclaim, to publish.” The word “utter” is thus defined by Johnson: “From the adjective; to make public or let out—*palam facere*, 1, “to speak, to pronounce, to express;” 2, “to disclose, to

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discover, to publish ; 3, "to sell, to vend ;" 4, "to disperse, to emit at large ; 'to preserve us from ruin the whole kingdom should continue in a firm resolution never to receive or utter this fatal coin'—*Swift* ;" 5, "to put forth." The case of *Rex v. Shukard*, R. & R. 200, is expressly in point.

[LORD CAMPBELL, C. J. The words of the report are, "they seemed to be of opinion."

JERVIS, C. J. You observe the words, "upon it." The judges were of opinion that it should be parted with, or tendered or offered, or used in some way to get money or credit upon it.]

In the case now before the court the document was not used to get money or credit upon it. The prisoner in effect said, "I am a man of substance, here are my receipts." The case of *Regina v. Radford*, 1 Den. C. C. 59, will, no doubt, be relied upon by the prosecution ; but the present case is distinguishable from that ; because, in *Regina v. Radford*, credit was obtained directly by means of the instrument.

[POLLOCK, C. B. There the prisoner said, in effect, "Here is your receipt in discharge of payment."]

Metcalfe referred to *Gingell* and *Purkins*, 4 Exch. R. 720 ; and *Standish v. Ross*, 3 Exch. R. 527.

[JERVIS, C. J. Take the case of justification of bail ; a man produces a forged deed, or a forged lease, to prove that he is of sufficient property, would that be an uttering ?]

That is going farther than the present case. There there would be an obtaining credit upon it. In the 11th edition of a work, formerly edited by one of your lordships,¹ Arch. Crim. Pl., by Welsby, Mr. Welsby, who may be cited as authority, comments on the words, "utter or publish."

[POLLOCK, C. B. Not yet an authority.]

It is, no doubt, a rule, that a writer on law is not to be considered an authority in his life.² The only exception to the rule, perhaps, is in the case of Justice Story.

[COLERIDGE, J. Story is dead.

CRESSWELL, J. No doubt the cases are carefully abstracted by Mr. Welsby in the passage you refer to.

LORD CAMPBELL, C. J. It is scarcely necessary to say that my opinion of Mr. Welsby is one of sincere respect.]

Metcalfe cited *Regina v. Harris*, 8 Car. & P. 428. In the case of *Regina v. Longhran*, 3 Cr. & D. 333 (Irish Rep.) the prisoner handed to another man a parcel containing 100 counterfeit shillings — requesting him to deliver the parcel to prisoner's wife ; held by Cramp-ton, J., to be no uttering. In *Dewlin's case*, Alison's Principles of Criminal Law, 402, a forged note was taken by prisoner out of his

¹ Lord Chief Justice JERVIS.

² This rule seems "more honored in the breach than in the observance." The annotations of Mr. Greaves, Russ. on Crimes, and the learned work of Mr. Pitt Taylor on Evidence, are constantly cited in crown cases ; and the writings of Chitty, Starkie, and also of Story, were referred to in the same way, in their lifetime.

pocket, and put in his hand, whence it fell to the ground, and the prisoner was about to hand it over the counter,—held to be no uttering. It is observed in the same work, “It is sufficient to complete the crime if the forged instrument have been uttered, *i. e.* presented in payment, or made the foundation of a claim, though no advantage whatever was gained from the act. In the Report of the Penal Code of Massachusetts, 1844, Crim. Law Commissioners—the following definition of the word “uttering,” occurs;—*tit. Forgery: 12.*—“The uttering of a writing is in respect to forgery, &c., the fraudulently and deceptively offering, passing, negotiating, assigning, transferring the same, or putting the same in circulation as being true and genuine, according to its apparent import, by a person knowing the same to be false, with the intent that any person shall be thereby deceived, and that any person shall be thereby defrauded or prejudiced;”—citing *Rex v. Shukard*. In Metcalf and Perkin’s United States Dig. Forgery, 18, “passing” a paper is defined as putting it off in payment or exchange; “uttering,” as a declaration that it is good with an intention to pass, or an offer to pass it; *U. S. v. Mitchell*, 1 Bald. 366. So in Curtis’s United States Digest. Pledging a counterfeit note, which was to be redeemed at a future day, is not a “passing within the meaning of the act.” *Gentry v. The State*, 3 Yerg. 451. Putnam’s Supp. to M. & P. Digest, Forgery, 98.

[JERVIS, C. J. If the landlord had called for his rent, and the same ceremony had been gone through by the prisoner, would that be an uttering?]

That must be admitted.

[JERVIS, C. J. The jury have found that there was an intent to defraud.

LORD CAMPBELL, C. J. In *Regina v. Radford*, the credit was not obtained upon the instrument, but in consequence of it.]

In conclusion, it is submitted that in order to make an uttering, the instrument must be used in some way to get money or credit upon it.

Parry, for the crown.

The only point for the consideration of the court is, is this an uttering? on the last argument it was contended that no intent to defraud appeared.

[LORD CAMPBELL, C. J. The jury have found that there was an intent to defraud.]

The words of the act of parliament are, “utter, or put off;”—not as in the old statute, “put away,” and it is submitted that the present facts amount to a putting off. The uttering of a receipt is for the purpose of covering an antecedent fraud.

[COLERIDGE, J. Suppose a receipt is produced when a sum of money is claimed.

LORD CAMPBELL, C. J. Or upon the settlement of an account a forged receipt is produced?]

It is employed for the purpose of fraudulently obtaining money, but not upon it. A servant is charged to pay money; he says, “I

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have paid it, and I produce the receipt;" He does not get money upon it, but surely that would be an uttering. Supposing the person had been indicted for forging the instrument; the intent to defraud is a direct presumption of law; if this be an instrument for the forgery of which he might have been indicted, could he not be convicted of uttering. *Regina v. Cooke*, 8 Car. & P. 582, before Patteson, J., is an authority in support of this view. There, however, it is admitted the prisoner got credit on the instrument; and so here.

[LORD CAMPBELL, C. J. No; not upon it. *Regina v. Cooke* comes in the class of *Rex v. Shukard*, and does not advance your argument.]

The prisoner gets credit for the payment of his rent.

[POLLOCK, C. B. Not from his landlord.]

JERVIS, C. J. I am desirous that the decision of the judges in *Rex v. Shukard* should be considered. How can a man get money on a court-roll, exhibited for purposes of fraud?]

Perhaps in *Shukard's case* the judges were not satisfied that there was evidence that the defendant "published" the notes. It has been argued that the prisoner, in the present case, did not use the forged receipt to get credit upon it; but, whether he or a third person obtained the credit, cannot make any difference. *Rex v. Birkett*, R. & R. 86.

[POLLOCK, C. B. Here the receipt is not used against the landlord or the rate collector for the object for which a receipt is intended, but for a collateral purpose. Is not the present like the case where a man points to plate lying in a room, as a proof that he is rich, and thereby obtains credit?]

That would be a false pretence.

[JERVIS, C. J. The question is, is not the rule in *Rex v. Shukard* too strict?

LORD CAMPBELL, C. J. If in the case of the justification of bail, a false receipt be produced, and its production be an uttering, then there is an uttering here.]

Parry cited *Regina v. Welch*, 2 Den. C. C. 78.

Metcalf replied.

Cur. adv. vult.

On the 29th May, A. D. 1852, the judgment of the court was given by Lord Campbell, C. J.¹

We are of opinion that this conviction ought to be affirmed. Upon consideration there clearly seems to us to have been an uttering of the forged receipt within the meaning of 11 Geo. 4, & 1 Wm. 4, c. 66, s. 10.

If it had been used in the manner stated, for the direct purpose of gaining credit for the payment which it purports to vouch, there can be no doubt, since the case of *Regina v. Radford*, that there would

¹ The editor is indebted to the kindness of the Lord Chief Justice for his lordship's MS. of the foregoing judgment.

have been a sufficient uttering. But the prisoner's counsel contended, that there cannot be an uttering of a forged receipt unless it be used directly to gain credit upon it by its operating as a receipt; so that merely using this receipt for the purpose proved, to induce a belief that he had paid the money, and therefore was a man of substance, does not amount to an uttering within this act of parliament. *Rez v. Shukard*, which was mainly relied upon for this distinction, does not seem to us to support it. That case is entitled to the highest respect, and upon similar facts we should submit to its authority. But the learned judges there did not proceed upon the distinction that to make the using of a forged negotiable instrument a felonious uttering, the intention of the prisoner must be to gain credit upon it by making it operate as such. They appear to have thought that there the evidence was not sufficient to show an intention in the prisoner to induce the innkeeper to advance any money or to give credit upon it to him. The doctrine supposed to be established by that decision is, "that in order to make it an uttering it should be parted with or tendered or used in some way to get money or credit upon it." The words, "upon it," we consider as equivalent to "by means of it;" otherwise there could hardly be an uttering of court rolls and other instruments enumerated in the statute.

In the present case it is expressly found "that the prisoner placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance money to Gillard." This was a using of the forged receipt to get money upon it, or by means of it, as much as if the prisoner himself had been to the borrower of the money, and the receipt had purported that he had paid the rates, and the prosecutor had thereupon advanced him a sum of money, and had been cheated out of it by him.

We, therefore, think that the conviction was according to decided cases and sound principles of law.¹

¹ In *The State v. Beeler*, 1 Brevard, 482, it was held, that staking counterfeit coin at a gaming table, as and for good money, was an attempt to utter or pass the same; and, that actually losing it at play, was a "passing" of the same within the law. And see *Commonwealth v. Woodbury*, Thacher's C. C. 47, (1824). But in *Gentry v. The State*, 3 Yerger, 451, (1832), it was determined, that pledging a counterfeit note, which was to be redeemed at a future day, was not a "passing" within the meaning of the statute of Tennessee.

In *Hopkins v. The Commonwealth*, 3

Metcalf, 464, (1842,) SHAW, C. J., said, "the word 'pass,' when applied to bank notes, generally meant, to deliver them as money, or as a known and conventional substitute for money." In order to pass a counterfeit bill or coin, it must be received by the person to whom it is offered. But a person may be guilty of uttering, who only declares, by word or act, that a bill is good, with intent to pass it as such. See *The United States v. Mitchell*, 1 Baldwin, 366, (1831); *Commonwealth v. Searle*, 2 Binney, 339, (1810).

Regina v. Oldham.

REGINA v. OLDHAM.¹

May 29, 1852.

Implements of Housebreaking — Possession of at Night — Stat. 14 & 15 Vict. c. 19, s. 1.

Whether an implement is to be considered an implement of housebreaking, within stat. 14 & 15 Vict. c. 19, s. 1, must depend upon the purpose for which the person charged has possession of it.

Any implement that may be used for the purpose of housebreaking, if the jury find it to have been in the possession of the person charged for that purpose, at the time and place alleged, is an implement of housebreaking within that section, although it may also be an implement which is used in the ordinary affairs of life for lawful purposes.

Where, therefore, upon the trial of an indictment under that section, the evidence was that the prisoner was found by night, and without lawful excuse, in possession of a number of house-door keys, and a pair of pincers, all of an ordinary description, but not in possession of any of the particular implements of housebreaking enumerated in the section, and the jury found that the prisoner at the time had the keys in his possession for the purpose of housebreaking : —

Held, that he was properly convicted of the offence thereby created.

At the Court of General Quarter Sessions holden for the county of Lancaster, at Kirkdale, on the 20th of April, 1852, Joseph Oldham was tried before John William Harden, Esq., and others, justices of the peace, upon an indictment charging him with being found by night, having in his possession, without lawful excuse, certain implements of housebreaking, to wit, one pair of pincers, ten keys, and a piece of iron, against the form of the statute; and it appeared in evidence that the prisoner was found by night, and without lawful excuse, in possession of a number of house-door keys, and a pair of pincers, all of which articles were of an ordinary description, such as are commonly used for lawful purposes, but which were capable, from their nature, of being also used for purposes of housebreaking. It was objected, on the trial, that the evidence did not support the indictment, as the articles were not either picklock keys, implements of housebreaking, or any of the other articles mentioned in the first section of the stat. 14 & 15 Vict. c. 19, which enacts, that "if any person shall be found by night armed with any dangerous or offensive weapons or instrument whatsoever, with intent to break or enter into any dwelling or other building whatsoever, and to commit any felony therein; or if any person shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall lie on such person), any picklock key, crow, jack, bit, or other implement of housebreaking; or if any person shall be found by night, having his face blackened, or otherwise disguised, with intent to com-

¹ 16 Jur. 505; 21 Law J. Rep. (N. S.) M. C. 134; 5 Cox, C. C. 551; 2 Denison, C. C. 472. Before Lord CAMPBELL, C. J., ALDERSON, B., MAULE, J., CRESSWELL, J., and ERLE, J.

mit any felony; or if any person shall be found by night in any dwelling-house, or other building whatsoever, with intent to commit any felony therein, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned with or without hard labor, for any term not exceeding three years." The chairman left it to the jury to say whether the articles so found in the prisoner's possession were implements which might be used for purposes of housebreaking, and whether, at the time he was so found in possession of them, it was his intention to use them as implements of housebreaking.

The jury found the prisoner guilty, but inasmuch as the question raised on the trial is not free from doubt, and the court was strongly urged by the learned counsel for the prisoner to submit it for the consideration of the judges of the superior courts, judgment was postponed, in order that such opinion might be taken, and the prisoner was remanded to the custody of the governor of the house of correction at Kirkdale, until the midsummer sessions.

The foregoing is the case upon which the opinion of the said judges is required accordingly.

The case was not argued by counsel.

LORD CAMPBELL, C. J. I am of opinion that this conviction ought to be affirmed. The prisoner is charged with having unlawful possession of instruments of housebreaking. Now, it is true that he had not any crowbar or picklock in his possession, and that the keys which he had were of an ordinary kind,—but the jury have found that there was the purpose and intent on the part of the prisoner to use those keys as implements of housebreaking; and though they may be used for lawful purposes, it is clear they may also be used for the purpose of housebreaking, which, as it appears to me, is all the statute requires.

ALDERSON, B. I am of the same opinion. Many cases may be put in which it would be perfectly clear that persons were in possession of perfectly lawful instruments, for housebreaking purposes. If, for instance, the door-keys to all the houses in a long street were found in the possession of a person, without lawful excuse, there could be very little doubt that he meant to use them as implements of housebreaking. Or, suppose a chisel, which exactly fitted a mark upon a particular door, which there had been an attempt to break open, was found upon a man, there could not be much doubt that it was an implement of housebreaking, although capable of being used for lawful purposes, and not specified in the act of parliament.

MAULE, J. In Mr. Greaves's edition of these criminal statutes, the words of the statute are set out: "or if any person shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall lie on such person), any picklock key, crow, jack, bit, or other implement of housebreaking;"—there is a comma after the word "key," and not one before it; but on the parliament roll it

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is well known that there are no stops, and I think the section should be read as if there was a comma before the word "key," as well as after it; "any picklock, key, crow," &c. If this is not so, then the act of parliament does not comprehend the most usual implement of housebreaking, — "skeleton keys." The word "picklock" is perfectly intelligible; and the word "key" would comprehend a skeleton key, and any kind of key capable of being employed for purposes of housebreaking. Upon this view of the statute, the possession of keys, without lawful excuse, falls within the express words of the act of parliament.

CRESSWELL, J. I am of the same opinion as my brother Maule.

ERLE, J. I also think that any implement capable of being used for the purposes of housebreaking, where the jury find that the person charged had them in his possession for the purposes of housebreaking, are within the statute.

Conviction affirmed.

REGINA v. THOMAS JOHNSON AND CHARLES WRIGHT.¹

November 22, 1851.

Larceny — Bare Custody.

Two men, J. and W., acting in concert, and intending to defraud S., entered the shop of S., and by means of an artifice induced him to draw a check on his bank for 42*l.*, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to S. of forty-two sovereigns, and that the prisoner W. was to remain at the shop till J. and S. went and returned from the bank.

At the bank, by the desire of S., the banker handed four ten pound notes and two sovereigns to the prisoner J., in the presence of S.

The prosecutor S., and the prisoner J., left the bank together, and while on their way back to S.'s shop, J. went into an inn-yard, and promising to return immediately, absconded with the four ten pound notes, and the two sovereigns, which he and the prisoner W. (who in the meantime had gone off from the shop with the forty-two sovereigns) appropriated to their own use:—

Held, that the misappropriation of the notes and two sovereigns was larceny, S. never having parted with the property and possession in them, and the prisoner J. having had no more than the bare custody of the money which he carried off.

At the General Quarter Sessions of the Peace held in and for the liberty of Peterborough, on the 3d of July, A. D. 1851, Thomas Johnson and Charles Wright were indicted for stealing a banker's check for the payment of 42*l.*, four bank notes for the payment of 10*l.* each, and forty-four sovereigns, the property of John Salaman,

¹ 2 Denison, C. C. 310.

and a verdict of guilty was recorded against them, subject to the opinion of the Court of Criminal Appeal on the following case:—

The prosecutor was seated at his shop door at Peterborough, on the 28th of June last, being market day. The prisoners placed themselves near him, and began a conversation about the sale of some beast and a pony; they disagreed as to the price, Johnson asking 42*l.*, and Wright offering 40*l.*, when the prosecutor said, "split the difference." Johnson then said Wright should have them, were it not that his (Johnson's) father would be angry, as Wright had bought two cows over his head. Wright offered to give up the cows. The prosecutor again interposed, and the prisoners appeared to conclude a bargain that Wright should give Johnson 42*l.* for the beast and the pony, and that a half sovereign should be returned, provided the prosecutor would take the money from Wright and pay it to Johnson, as if he, the prosecutor, were the buyer, and so that Johnson's father might believe him to be the real purchaser. The prosecutor consented to act as a "go-between." The parties then entered his shop, and Wright counted out forty-two sovereigns, forty of which passed through the prosecutor's hands to Johnson, and the other two laid upon the counter. Johnson laid down the forty sovereigns upon the counter also, with an explanation that his father, "who was an austere man," would not be satisfied without a check upon a banker, and requested the prosecutor to draw one accordingly. The prosecutor went round to his desk, leaving the prisoners with the sovereigns, drew the check payable to Thomas Johnson or bearer for 42*l.*, returned, and delivered it to Johnson. At this time he lost all thought of the money, and when he returned from his desk the sovereigns had disappeared. Johnson said, the prosecutor must go with him to the bank to draw the money. The prosecutor consented, and Wright was to remain in the shop until they returned "to finish the transaction." The prosecutor and Johnson left Wright alone at the shop door, and went to the bank together, when the check was cashed by desire of the prosecutor in four notes of 10*l.* each, and two sovereigns. Johnson took the money, and came out of the bank, the prosecutor stopping for a minute or two to give some directions about his pass-book. Instead of returning at once to Wright at the prosecutor's shop, Johnson requested the prosecutor to accompany him to an inn, where he said his father was, to satisfy him as to the business. They went into the inn-yard together, where Johnson called for his pony, at the same time slipping a half sovereign into the prosecutor's hand, saying, "I will go and turn out the beast," when he made off by the back entrance of the inn-yard, leaving the prosecutor with the half sovereign and the pony, which the ostler delivered to him, instead of returning with him to the shop (where Wright was to remain) "to finish the transaction," as the prosecutor all along expected was to be done, and the forty-two sovereigns handed over to him. The prosecutor then, for the first time, suspected that he had been cheated. He made haste home with the pony, and found that Wright had fled and the forty-two sovereigns also; nobody but the prosecutor's daughter having been in the shop. The pony, with the bridle and saddle,

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were not worth more than fifty shillings. The prisoner Johnson was well dressed, like a farmer, and Wright like a jobber, and the prosecutor swore that he believed them to be respectable men, and engaged in a *bonâ fide* transaction, and that he assisted in it purely out of good nature, and was not to receive one penny for what he did. He also stated that he should have allowed Johnson to go to the bank alone with the check, he remaining with Wright and the sovereigns in the shop, had not John requested him to go to the bank with him. The prosecutor expressly stated in his evidence that he expected Johnson was to come back with him to Wright, and that he was to have the forty-two sovereigns from Wright. That he did not expect Wright would "cut away," and did not consider Johnson at liberty to go off with the money before he, the prosecutor, had the sovereigns in exchange. It was proved that during the same morning the prisoners attempted to engage another party in a similar transaction, and evidence was given to show that the prisoners were acting in concert, and were apprehended in a gig together the same evening, about twenty miles from Peterborough, Wright having forty-five sovereigns found upon him.

The prisoners' counsel contended that these facts would not justify a conviction for larceny. The chairman, therefore, put the following questions to the jury :

First; did the prisoners throughout intend to get the property of the prosecutor into their possession by fraud, and apply it to their own use?

Secondly; did the prosecutor intend to part with his property in the check, and change until Johnson returned with them, and the prosecutor received the forty-two sovereigns?

Thirdly; if they should find that when the prosecutor gave Johnson the check he parted with the property in it, and the money obtained for it at the bank, whose property were the forty-two sovereigns left upon the counter?

And he directed them, that if they found the first question in the affirmative, and the second in the negative, that the prisoners were in law guilty of larceny of the check and change; and further, that if they found the first two questions in the affirmative, and found also that the forty-two sovereigns left on the counter became the property of the prosecutor when the check was delivered to Johnson or cashed at the bank, and were taken away by Wright, they were guilty of a larceny of those forty-two sovereigns. The jury found an original intent to defraud, followed by a general verdict of guilty, when the prisoners' counsel applied for a case for the opinion of the Court of Criminal Appeal, and thereupon the chairman requested the jury to give distinct answers to the several questions before stated; and they answered the first question in the affirmative, and the second in the negative, and no reply to the third question was thereupon asked for. If, upon the facts stated and findings by the jury, the prisoners are guilty of larceny, the verdict is to stand. The prisoners were liberated on giving bail to appear and receive judgment.

On the 15th of November, A. D. 1851, this case was argued

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before Lord Campbell, C. J., Maule, J., Platt, B., Talfourd, J., and Martin, B.

Mellor, Q. C., for the crown.

Bliss, Q. C., for the prisoners.

I submit that the prisoners are not guilty of larceny either of the, forty-two sovereigns, or of the check, or of the bank notes and two sovereigns, the change for the check. First, as to the forty-two sovereigns, there could be no larceny of them,—they never were in the possession of the prosecutor. They merely passed through his hand from Wright to Johnson, and the opinion of the jury was not taken as to these forty-two sovereigns.

[LORD CAMPBELL, C. J. As to the forty-two sovereigns, there is no conviction.]

Secondly, as to the check, there was no larceny. There was no abstracting,—no felonious taking.

[LORD CAMPBELL, C. J. You say that the check was not taken *invito domino*.]

The check was absolutely passed over to the prisoner Johnson by the prosecutor, and it was presented at the bank at the prosecutor's request. There was no taking, without which there can be no larceny. That was done with the check which the prosecutor himself desired should be done with it, according to the purport, tenor, and effect of the check, which was payable to the prisoner Johnson by name. Thirdly, the bank notes and the two sovereigns, the change for the check, never were the prosecutor's. This point is not determined by the finding of the jury, for the question is not what the prosecutor intended, but what the banker, the prosecutor's agent, intended and did. The banker having the possession and authority, clearly intended to give the money, and did give it to the prisoner.

[MAULE, J. Is it not open to the prosecutor to say that the prosecutor and the prisoner went to the bank together; that the prisoner had the check, which was the property of the prosecutor, and that the banker gave them, being both together, change for the check?]

If the prosecutor were induced to part with the possession only, and not the property, then this would no doubt be a case of larceny, but if he parted with both the property and the possession, then it would be a case of false pretences.

[PLATT, B. The banker had the property of the notes and two sovereigns before in himself.]

And he transfers it to the prisoner. It makes all the difference that a third person hands over the notes.

[LORD CAMPBELL, C. J. But the prosecutor was present; and whose the property was depends upon the understanding between the prosecutor and the prisoner.]

The notes were paid by the banker to the prisoner.

[MARTIN, B. Suppose two gentlemen go to a bank. One of them has a check, and at the counter he gives it to the other, who hands it

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in and receives the amount in change,— whose money would the change be?]

But if the prosecutor never had possession except by the prisoner, the offence would not be larceny, but embezzlement. In larceny the prosecutor must have had a corporal possession. *Rex v. Bazeley*, 2 Leach, 835; 2 East P. C. 571; *Rex v. Waite*, 1 Leach, 28; *Rex v. Bull*, 2 Leach, 841; *Regina v. Watts*, 2 Den. C. C. 14, 1 Eng. Rep. 558.

Mellor, Q. C., for the crown.

First, it is important to observe that it is found in the case that there was an original intention on the part of both the prisoners to deprive the prosecutor of his property, by means of fraud; but the prosecutor never did part with the property, in the sense in which the cases go. If the prisoner, by means of a trick, obtained the check *animo furandi*, he is guilty of larceny.

[LORD CAMPBELL, C. J. Although all that is done, is done as arranged by the prosecutor.]

Yes; but as it was done by fraud and trick, in contemplation of law, it was done against his will.

[MAULE, J. Would not that put an end to all the distinctions between larceny and false pretences?]

I apprehend not. 2 Russell on Crimes, 23, 24. At the banker's, the prosecutor and the prisoner were present together. The check was as much in the possession of the prosecutor as of the prisoner. The prisoner had but the "bare custody;" and Lord Hale says, such bare custody is not enough to prevent an offence from being larceny. According to the finding of the jury, the prosecutor did not intend to part with his property in the check till he received forty-two sovereigns for it. There is no pretence that the prisoner received the check lawfully. By a trick, he induces the prosecutor to give it to him. Possession rightly means an independent possession, and there was no independent possession in the prisoner, either of the check or of the notes. *Rex v. Spears*, 2 East P. C. 568; 2 Russell on Crimes, 23. The prisoner had no independent possession of the notes and two sovereigns. They were the property of the prosecutor, and constructively the possession remained in him all the time. The prisoner had the custody of the notes and the two sovereigns, but the custody only, for the prosecutor never intended to part with the property or possession in them, until he received at his shop the forty-two sovereigns, as agreed upon. The prisoner never had an independent possession of the notes and two sovereigns, and unless he had such an independent possession, his misappropriation of them was larceny.

Bliss replied, and cited *Rex v. Robson*, Russ. & R. 413; *Rex v. Nicholson*, 2 East P. C. 669; *Rex v. Bazeley*, 2 East P. C. 571; *Rex v. Tilley*, 2 Leach C. C. 662; *Rex v. Spears*, 2 Leach C. C. 825.

Cur. adv. vult.

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On the 22d of November, Lord Campbell, C. J., delivered the following judgment¹:—

We are of opinion that the conviction is right, with respect to the bank notes and the two sovereigns that were given in exchange for the check. It appears that the check was the property of the prosecutor, and the jury have found that the prisoners throughout intended to get the property of the prosecutor into their possession by fraud, and apply it to their own use, and that the prosecutor did not intend to part with his property in the check and the change for it until Johnson returned with the change, and until the prosecutor received the forty-two sovereigns. The check then being the property of the prosecutor, he accompanied Johnson to the banker's to get it cashed; and it is expressly found that "the prosecutor and Johnson left Wright alone at the shop door and went to the bank together, when the check was cashed, by desire of the prosecutor, in four notes of ten pounds each and two sovereigns." Now these words to which our attention was not particularly called on the argument of the case, are material, because they show that the prosecutor continued to exercise a control over the transaction as owner of the check, and that it was upon his direction that the banker paid the check in four notes of ten pounds and two sovereigns. These notes and sovereigns were handed over to Johnson with the permission and by order of the prosecutor. Johnson was intrusted by the prosecutor to hold them, and merely to hold them; he had the custody of the money, and not the possession. The possession still remained in the prosecutor. The property remained in him, and he had never parted with the possession. Johnson received the notes and sovereigns with intent to steal them, and the case clearly amounts to larceny. The cases in 2 East, P. C. are directly in point.

REGINA v. WILLIAM POWELL.²

January 28, 1852.

Burglary—Goods and Chattels—Choses in Action.

The prisoner was indicted for having burglariously broken and entered the house of the prosecutor, in the night-time, with intent to steal the "goods and chattels" therein. The jury found that he broke and entered the house with intent to steal mortgage deeds:—

Held, that being subsisting securities for the payment of money, mortgage deeds are *choses in action*, and as such, were improperly described in the indictment as goods and chattels, and, consequently, that the conviction was wrong.

WILLIAM POWELL was tried before Mr. Justice TALFOURD, at the

¹ The other judges present were ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B.

² 2 Denison, C. C. 403.

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last assizes for Brecon, on an indictment charging him with burglariously breaking and entering the dwelling house of David Williams, in the night-time, with intent to steal goods and chattels therein.

The prisoner, in 1843, borrowed of David Williams the sum of 600*l.*, and executed to him a mortgage in fee of freehold land; and in the year 1848 he borrowed of Williams the further sum of 200*l.*, and executed another mortgage by way of further charge on the same land. Both deeds contained the usual provisos of redemption and covenants for the payment of principal and interest of the sums advanced. Williams, the mortgagee, brought an action of debt against the prisoner for the recovery of these sums remaining unpaid, which was pending for trial when the burglary was committed.

The evidence proved that the prisoner committed the burglary for the purpose of stealing the mortgage deeds; and, in answer to a question put to the jury by the judge, after they had delivered a verdict of guilty, they stated that the offence was committed with intent to steal the mortgage deeds. In a bundle with the first deed, which had been kept in a drawer, ransacked on the night of the burglary, was a satisfied and cancelled bond of a former mortgage, belonging to Williams, the mortgagee, and which was afterwards kept with both mortgage deeds, but then was in fact at the office of the mortgagee's attorney when the burglary was committed.

On the part of the prisoner it was objected that the intent was not properly alleged in the indictment, as, though the mortgage deeds might be the subject of statutable larceny as "valuable securities," they were not "goods and chattels." His lordship overruled the objection, thinking that the mortgage deeds being substantially securities for debts, and containing covenants to pay principal and interest, were distinguishable from deeds which, as "savoring of the realty," were not the objects of larceny at common law, and that the parchments on which the covenants were inscribed were chattels, if, indeed, the words "goods and chattels" might not be rejected as surplusage.

The prisoner was sentenced to ten years' transportation, but doubts having been suggested if he was properly convicted, on the objections as applied to the facts, the learned judge reserved this case for the judgment of the Court of Criminal Appeal; the prisoner remaining in this country under his sentence.

The counsel for the prosecution also relied on the satisfied bond as, at all events, the subject of larceny.

The question for the court is, whether the conviction is right?

On Saturday, 24th January, A. D. 1852, this case was argued before JERVIS, C. J., ALDERSON, B., COLERIDGE, J., WIGHTMAN, J., and TALFOURD, J.

Slade Q. C., and *T. Allen*, for the prisoner.

Slade referred to the indorsement of the verdict on the briefs of counsel at the trial — "Guilty of breaking into the house of the prosecutor by night, with intent to steal the mortgage deeds only."

[JERVIS C. J. The statute only gives us power to deal with the case reserved for our consideration, and we cannot enter into any other question.]

ALDERSON, B. The jury having found that the offence was committed with intent to steal the mortgage deeds, we shall infer that they find him guilty of that intent only.]

The charge against the prisoner at the trial was, that he had committed burglary. Burglary is defined as a breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not. In order to constitute burglary, there must be the intent to commit a felony. If it appear that the breaking and entering was to commit a mere trespass, it will not amount to a burglary, and the party injured will be left to a civil remedy. It is necessary to prove the intent laid in the indictment as laid. Now it is alleged in the indictment, that the prisoner broke and entered the dwelling-house of the prosecutor with intent to steal the goods and chattels therein. It must, therefore, appear that the prisoner intended to steal goods and chattels. But the jury find that the intent of the prisoner was to steal the mortgage deeds. In the year 1843, the prisoner borrowed the sum of 600*l.* from the prosecutor, and then executed to him a mortgage in fee of freehold land; and, in the year 1848 borrowed of him a further sum of 200*l.*, executing another mortgage by way of further charge on the same land. The prosecutor brought an action of debt against the prisoner to recover these sums; and the prisoner supposing that these mortgage deeds were at the house of the prosecutor, broke into his house with intent to possess himself of these deeds, though, in fact, they were at the office of his solicitor. The satisfied bond, it is assumed, is out of the question.

[ALDERSON, B. The question is, whether mortgage deeds are "goods and chattels?"]

The intent proved is to steal mortgage deeds. The intent laid is to steal goods and chattels. It is submitted then, first, that mortgage deeds are not goods and chattels, because they savor of the realty.

[WIGHTMAN, J. Would they go to the heir or to the executor?]

The courts have differed in their views upon the subject. But it is not material, for if it should be held that they would go to the executor, the prisoner is prepared to contend that they are *choses in action*,—securities for money.

[TALFOURD, J. You are aware of the case, *Regina v. Vise*, 1 Moo. C. C. 218.]

The case of *Regina v. Vise* is distinguishable from the present. Your lordships are aware that it is laid down in the authorities, that the box in which charters concerning the realty were kept, could not be the subject of larceny, on the principle *et omne majus dignum trahit ad se minus*, 3 Inst. 109, where lord Coke cites 10 E. 4; 14 Lib. 8, fol. 33 b. See also Noy's Maxims, M. 17. It was held, that the character of the box was changed by its relation to the realty. So, here the inferior character of this deed as a security for money is

merged in its character as a conveyance of a real estate. No larceny could at common law be committed of a title deed to a real estate; yet every such deed was once parchment, which might have been the subject of larceny; the parchment is engrossed, and finally it is sealed, when it becomes a deed savoring of the realty. Such a deed may have a picture or a map upon it, which by itself would be of goods and chattels, but still at common law, because it savored of the realty, no larceny could be committed of it.

[COLERIDGE, J. Both deeds contained the usual proviso for redemption.]

That is so. To steal any paper or parchment being evidence of the title, or part of the title of any real estate, is a statutable misdemeanor, by 7 & 8 Geo. 4, c. 29, sect. 23. The jury have, therefore, found the prisoner guilty of breaking into the house of the prosecutor with intent to commit a misdemeanor; but, in order to constitute burglary, there must have been an intent to commit a felony.

[JERVIS, C. J. Does not that mean any deed that would show a clear title to the estate?]

A mortgage deed, as being a security for money, is a *chose in action*. At common law no larceny could have been committed in respect of a deed, a security for money, or an evidence of title; in the last case, because it savored of the realty, in the other, because it was a *chose in action*. And acts of parliament were passed for their protection, 2 Geo. 2, c. 25, s. 3, repealed, and 7 & 8 Geo. 4, c. 29, ss. 5, 23. At common law the sheriff could not, under a *fi. fa.*, seize securities for money; and he was only empowered to do so by 1 & 2 Vict. c. 110, s. 12. In the case of *Regina v. Perry*, 1 Den. C. C. 69, a case before Coleridge, J., where the prisoner was charged in one count of the indictment with stealing a check, and in another count with stealing a piece of paper; it was held, that supposing the check to have been a void check, it would still sustain the charge laid in the second count. There, whether the thing stolen was a check, or a piece of paper,—*quacunque via*,—the prisoner was guilty. But here the case is different, for the character of the parchment has merged into the deed. The prosecutor has chosen to allege in the indictment, that the intent of the prisoner was to steal goods and chattels, and it must be proved as laid. In *Westbeer's case*, 1 Leach C. C. 12, the judges held that the prisoner could not be convicted of stealing a parchment, because it savored of the realty. It was suggested at the trial that the words "goods and chattels" might be rejected from the indictment as surplusage. But how then would the case stand? That the prisoner broke and entered with intent to steal. Now there are many things to steal which would not amount to felony. The stealing of some things is no more than a misdemeanor, and the stealing of others, such as a dog or a cat, or animals in the eye of the law of no value, would be no indictable offence. If you reject the words "goods and chattels," then it would not appear whether the intent of the prisoner was to commit a felony, or a misdemeanor, or some lesser offence.

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[JERVIS, C. J. The indictment would be bad in arrest of judgment, unless it appeared that the intent of the prisoner was to commit a felony.]

An intent to steal "goods and chattels," is laid in the indictment; but the evidence shows that the intent was to steal *choses in action*.

[TALFOURD, J. You say that mortgage deeds are not valuable securities?]

They are *choses in action*, — not goods and chattels.

[WIGHTMAN, J. The mortgage deeds are chattel, are they not?]
Not at common law.

[WIGHTMAN, J. There are chattels real as well as chattels personal. May it not then be said that the deeds are well described in the indictment as "goods and chattels?"]

ALDERSON, B. When, by the common law, stealing chattels personal only amounts to the offence of larceny, and an indictment alleges that goods and chattels are stolen, proof that chattels real were stolen, would not sustain that allegation. If the whole sentence "with intent to steal goods and chattels therein," be struck out of the indictment, then, all that remains is, that the prisoner broke into the prosecutor's house, unless the word "burglariously" can be said to imply the intent to commit felony.

JERVIS, C. J. That would not do. The word *burglariter* cannot aid the statute. It would be no more than saying that a man feloniously walked along the street, which might mean that his purpose was to pick pockets.]

No counsel appeared for the crown.

Cur. adv. vult.

On Tuesday, 27th of January, A. D. 1852, the following judgment was read by —

JERVIS, C. J.¹ We must assume, from the finding of the jury, that the prisoner broke into the house of the prosecutor with intent to steal the mortgage deeds in their uncanceled state. This finding makes it unnecessary to consider whether the securities savor of the realty or are evidence of the title to real estate so as not to be the subject of larceny, because, being subsisting securities for the payment of money, they are clearly *choses in action*, and, as such, are not properly described in the indictment as goods and chattels. This was ruled in *Cayle's case*, 8 Co. 33, a. 3 Inst. 109, and *Channell v. Robotham*, Yelv. 68, where it was decided that a bond could not be included under the words *bona et catalla*, though it was objected that the parchment and wax were such, and might pass by that name, yet, forasmuch as the debt included and wrote upon it is the principal, the words of the grant ought to comprehend the name of the principal. In *Vyse's case*, Mood. C. C. 218, referred to on the argument, the notes had been paid, and though reissuable, were not, at the time of the larceny, securities for the payment of money. The paper and stamp upon which they were written were, therefore, properly described as goods and chattels.

For these reasons we are of opinion that the conviction was wrong.

¹ The other judges present were Lord CAMPBELL, C. J., POLLOCK, C. B., PARKE, B., ALDERSON, B., PATTESON, J., COLERIDGE, J., MAULE, J., WIGHTMAN, J., CRESSWELL, J., PLATT, B., WILLIAMS, J., and TALFOURD, J.

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REGINA v. ELIZABETH BROOKS.¹

April 23, 1853.

Receiving stolen Goods—Husband and Wife—A Wife cannot be convicted of feloniously receiving from her Husband Goods stolen by him.

THE prisoner was indicted, at the Liverpool Borough Sessions in February last, for feloniously receiving goods, knowing them to have been stolen. The husband of the prisoner had been for several years employed as a salesman by a shopkeeper in Liverpool, who dealt in the articles mentioned in the indictment. In the course of the year 1852 the husband had stolen from his master's shop the goods in question, and delivered them into the hands of the prisoner, his wife. None of these articles were missed before the prisoner's apprehension, and whether they were stolen at one time or at different times, or whether they were delivered to the prisoner at one time or at different times, did not distinctly appear. On the first suspicion of his dishonesty the husband absconded. His house was searched, and a box was taken from the prisoner, after some struggle on her part to retain it. This box contained some pawn-tickets relating to, and which led to the discovery of, the lost property. Several of these pawn-tickets had been given for articles which the prisoner had herself pledged, falsely stating, as to some, that they were birthday presents, and as to others, that they were articles in which she dealt. In two instances the prisoner had sent different persons to pledge some of the articles produced, and had afterwards received the pawn-tickets and money lent by the pawn-brokers. The jury were told by the recorder, that as her husband had delivered the stolen articles to the prisoner, the law presumed that she acted under his control in receiving them, but that this presumption might be rebutted. If, therefore, on considering the evidence, they were perfectly satisfied that at the time when she received all or any of the articles produced she knew that they were stolen, and in receiving them acted not by reason of any control or coercion of her husband, but voluntarily, and with a dishonest and fraudulent intention, she might be found guilty. The jury returned a verdict of guilty; but the learned recorder, entertaining doubts as to the law, reserved for the consideration of the Court of Appeal the questions, whether his direction was right, and whether, on the evidence stated, the case ought to have been left to the jury.

Brett, in support of the conviction, contended that the wife might be convicted of receiving goods stolen by her husband, if at the time she received them she knew they were stolen, and did not act under the coercion of her husband.

Jervis, C. J. If there were plenty of evidence, I do not see how this is any offence; but there really is no evidence.

Parke, B. A wife cannot be accessory after the fact, and I think she cannot be a receiver of stolen goods from her husband under any circumstances.

Alderson, B., and Wightman and Cresswell, JJ., concurred.
Conviction quashed.

CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

DOCTORS' COMMONS;

DURING THE YEAR 1852.

PREROGATIVE COURT.

BANNATYNE v. BANNATYNE.¹

February 9, 10, and 16, and March 12, 1852.

Commission of Lunacy — Lucid Interval — Distinction between Mania and Idiocy in respect of Evidence.

In 1815, the deceased was placed in confinement as a lunatic, and there remained till 1817, when he was released. In 1820, he made a rational will, which was written for him by his mother. In 1822, he was again placed in confinement, and so remained till his death, in 1849. In 1838, he was found, on a commission, to have been of unsound mind, without lucid interval, since 1815. On the evidence, the will pronounced for.

Acts of business are strong evidence in a case of alleged idiocy, as distinguished from a case of mania.

THIS case, the facts of, and principles applicable to, which are fully stated in the judgment, was argued by

Addams and *Curteis*, in support of the will.

J. D. Harding, Q. A., and *Twiss*, contra.

March 12. Dr. LUSHINGTON. This suit has been instituted for the purpose of obtaining the decision of the court whether the will of James Bannatyne, dated the 15th August, 1820, be valid or not. The parties propounding the will are the two surviving brothers of the testator; and the parties opposing, the children of a brother who predeceased the testator. The sole question in the case is, whether the testator was of sound mind or not at the time of the execution of the instrument. Before I enter upon the question of sanity, it may be expedient to recapitulate some of the leading facts, respecting which there is no controversy. It appears that the mother of the deceased was a widow, resident in Bath from an early period, and that she had four sons; that James Bannatyne, the deceased in this cause, some years before 1814, went to India; that in the year 1814, he returned, and in 1815 he was received as a resident either in the private house or in the asylum for persons afflicted with mental disorders, kept by Dr. Langworthy, at Box, a few miles from Bath; that in 1817 he returned to his mother's house; that in 1822 he was again placed in Dr. Langworthy's establishment. Whether he was also there in the interval between 1817 and 1822, is a question of fact disputed in this cause, and of which I must speak hereafter. Subsequently to 1822, the deceased was clearly of unsound mind. He lived in Bath, under the care of his mother, till her death in the year 1838. Soon after that death, an inquisition *de lunatico inquirendo* took place; the jury found that the deceased was of unsound mind, without a lucid interval, from 1815 to that time. In 1849 he died. His brother Frederick died some years before, leaving children, who are the parties opposing the will. The contents of the will, briefly stated, are, to give to a natural daughter 4,000*l.*, to the testator's mother a life interest in all the residue, which residue, on her death, was to be divided amongst his three brothers. What his property was at the time of making the will I have no information — probably considerably less than at the time of his death, when it is stated to have been about 36,000*l.* The brother Frederick having predeceased the testator, and he having been one of the residuary legatees, his share of the residue lapsed, supposing that the will be pronounced for; and so far the testator died intestate. This lapsed share would belong to the two surviving brothers and to the children of the brother who died. The will is in the handwriting of Mrs. Bannatyne, the mother; it is signed by the deceased, and witnessed by two witnesses. Of course, if it were not for the facts presently to be discussed, the original presumption of law would be in favor of the validity of this will. There has, however, taken place a circumstance much dwelt upon in this cause, which counterbalances that presumption. I purposely use the phrase "counterbalance," because I am about to consider the effect of the finding of the jury — that the deceased was, for a long period antecedent to the making of the will, of unsound mind, without a lucid interval. I conceive that I am bound to presume that the jury performed their duty conscientiously and with due care; that they had before them evidence which satisfied their minds, and laid a just foundation for their verdict; and it

must be admitted that from that verdict a legal presumption arises against the validity of the will in question. But I am also of opinion, that, in endeavoring to measure the strength of that presumption, I am bound to look at all the circumstances attending the inquisition, though not to the evidence given thereat. The facts uncontroverted are, that this 'proceeding was altogether *ex parte*. No person was present interested, in procuring the verdict, in carrying the lunacy back to any period whatever; no person even to point out to the jury that the interest of any one could be affected by their verdict. The jury had not, so far as appears, any conception of the effect of their verdict upon this will, or upon any interest whatever. These circumstances, in fact, operate both ways: in support of the verdict, to show that there was no attempt made to induce the jury to find this particular verdict; against the effect and weight of the verdict, as showing that the attention of the jury was not specially directed to the state of the deceased in the year 1820, when the will was executed. Three witnesses only were examined, and their evidence covered a space of twenty-four years; nineteen years had passed since the date of the will. I disclaim emphatically all reference to the evidence before the jury, Legally speaking, I think I have no right to refer to those scraps of the evidence which are brought out by the cross-examination of Mr. Philip George. I think I cannot refer to them as evidence whether the testator was of sound mind or not, though I think that what is stated by Mr. George is evidence to explain and justify his own conduct, and to prove that his answers are entitled to credit. Reviewing all these circumstances, I have come to the conclusion that the verdict of the jury is sufficient to rebut the ordinary presumption in favor of the will, and to require the party propounding it to prove that a lucid interval did take place, when the will was executed. By "lucid interval," I mean that the testator was of sound mind at that time, and I only call it a lucid interval because there was preceding and succeeding unsoundness of mind. Generally speaking, when we discuss the question of lucid intervals, they are short periods of returning sanity, the general state and condition of the testator being that of a person subject to lunacy; but it is difficult to discover any other term which I can apply on the present occasion, though it does seem rather inconsistent to talk of some three or four years as a lucid interval. But, though I think a presumption is raised against the validity of this will by the verdict, I am also of opinion that the facts stated greatly diminish the strength of that presumption, making it much less strong than if there had been an issue raised, and that issue contested, as to the existence of lucid intervals. After reviewing in my own mind what course I should pursue in the investigation of this case, I have, upon the whole, thought it best, in the next place, to consider the further evidence to unsoundness of mind and, in so doing, I must ever bear in mind the lapse of time which has occurred between the fact of most importance to be proved, and the period when the witnesses are examined; and this observation will apply to the witnesses on both sides. In sifting the evidence, it will be necessary, as accurately as the case will allow, to

ascertain, not only whether the facts actually did take place as stated, but at what period those facts and circumstances occurred. The memory is more tenacious of facts, as we all know, than of dates, but in this cause dates are of paramount importance. I think it wholly vain to attempt to ascertain the origin or cause of the unsoundness of mind with which this gentleman was unfortunately afflicted. That he was of unsound mind in the year 1815, is, I apprehend, a fact not disputed — at least, not disputed, as I think, effectually — for in that year he was an inmate either of Dr. Langworthy's house or his asylum, and in virtue of a certificate duly signed. I hold it but of very little importance whether he was in the private house or the asylum; he was equally under restraint; and I must, in the absence of all evidence to the contrary, believe that the certificate of his unsoundness of mind was signed with competent cause; nor is my opinion in the least shaken by any evidence as to his state on a casual visit, and for two reasons — first, it is notorious that the sane demeanor of a person on the occasion of an accidental visit is no proof, or at least no satisfactory proof, of unsoundness of mind; and, secondly, because after the lapse of thirty-five years, to which the witness speaks, the memory of any person speaking to an accidental visit cannot be safely trusted, unless, indeed, there were some special circumstances to impress, and deeply impress too, such interview upon the mind of him who gives the evidence; and such certainly is not the case, so far as the evidence throws any light, on the present occasion. I might add, that, looking at all the evidence in this case, it is not probable that Mrs. Bannatyne, who appears to have been a most affectionate mother, would have allowed her son to be placed under any restraint as a lunatic without good and sufficient cause. The unsoundness of mind in 1815, being, then, an undoubted fact, the question must ultimately be, what is the proof of recovery? Is it sufficient? Such must be the question to be solved; but it may be expedient, with a view to solve this question, to proceed with the averments and proofs of continued unsoundness of mind, remembering, however, that the burthen of proof is on those who allege recovery. It is pleaded in the allegation admitted on behalf of the opponents of the will, that the deceased, from the month of November, 1815, till his death, remained a lunatic, without a lucid interval. I am now adverting to the plea in the fifth article, that in 1817, having become more calm, but not being cured, he was removed from Box to the residence of his mother; that in 1818 he was again placed in the same asylum, and remained till 1819. These are the words of the plea.

Now, if this averment be true, it is impossible to doubt its great importance with reference to the issue in this cause, and for obvious reasons — first, because it shows, that whatever was the state and condition of the testator when he returned to his mother's roof in 1817, he relapsed in a short space of time, — not exceeding one year, — that confinement became necessary; and, secondly, it brings down the unsoundness of mind to 1819, a year preceding the date of the will. I must, therefore, ascertain how this averment stands, after considering the evidence applicable to it. Were it necessary, I would not

shrink from the task of going minutely into all the details of the evidence, but I cannot think that it is requisite for the purposes of justice, with respect to this point, so to do. I will advert to what I consider to be the most important. It is to be recollected, I am now speaking more especially of the fifth article, which pleads the going the second time to Box, in 1818, and remaining till 1819. The first witness examined to prove the return to Box, in 1818, is Burt. Burt went to live with Mr. Frederick Bannatyne, the brother, in 1815. It is most abundantly clear, from the perusal of his evidence, that he is unable to fix any date at all. He does not state that the deceased was sent to Box, in 1818, nor at all about that time; all that he can say is, that the deceased seemed well till he was sent to Box the second time, but when that second time was, he does not attempt to state. On the second article, he says three or four years; on the fifth article, two or three years; on the twenty-seventh interrogatory, four or five years. It is impossible, therefore, from any direct statement of this witness, to collect any proof which can bear on this fifth article. The only way of fixing any date to the fact, according to his evidence, is from the circumstances he deposes to as occurring prior to the second confinement, and when those circumstances occurred must be proved by other witnesses. If it should be proved that the deceased mixed in society, and conducted himself as a person of sound mind, at any period between 1818, and 1820, then the evidence of this witness shows that the second confinement could not have taken place until after 1820. Four other witnesses are examined on the fifth article, and they can give no evidence at all. It is not too much to say, that the evidence to establish this very essential part of the case has wholly broken down. It is a fact to be proved affirmatively, that the deceased did return to Box in 1818, and was there in 1819, and there is no evidence whatsoever to prove it. Now, as I must hereafter refer to the opposing evidence, it is scarcely worth while here to notice it; but just in passing by, I will state what opposing evidence there is, though I will not deal with it. Dr. Bright proves that there were only two certificates for admission into the Box asylum, one in 1815, the other in 1822. Can any rational ground be assigned for the absence of a certificate in 1818, if the deceased was again confined? I think none. There is, then, no evidence to satisfy my mind, that the deceased was in Box asylum between 1817 and 1822; on the contrary, all the evidence directly bearing on that point tends to a contrary conclusion. I must, therefore, prosecute this investigation upon the footing, that the deceased was not in confinement during that period; and then the inquiry is, what was his state and condition after 1822? It is admitted on all hands that he was of unsound mind. The real difficulty becomes this, to ascertain how much of the evidence applies to the period I have stated, and how much is applicable only to what occurred after 1822. As might naturally be expected after the lapse of so many years, several of the witnesses declare they are unable to fix any date at all to the transactions respecting which they depose; and not only do they so declare, but it is perfectly manifest, from a perusal of their evidence,

that the fact is so. The case of the opponents of this will is set forth in the second, third, fourth, and fifth articles of the allegation. To put the case briefly, it is simply lunacy without a lucid interval from November, 1815; and not lunacy merely, but idiocy, for it is alleged in the third article, that the deceased walked about in a stooping position, with his hands dangling before him, muttering unintelligible and idiotic noises; that the boys hooted him as an idiot; that he did not go into company, nor appear with the family when any one was present; that he did not transact any business, nor order clothes, and so forth, nor dress himself; that in 1819, and for a year and more after, he was under the care of a keeper. I believe I have faithfully given nearly the very words, certainly the substance, of the plea. Now, such was the state of things after 1822. Was it so before? If the deceased was in the condition as set forth in this plea, of course the will must be pronounced against. Such a state of things is utterly inconsistent with the rational despatch of any act of business requiring thought, judgment, and reflection. After the examination I have made of the evidence, I think I am perfectly justified in assuming, that wherever a witness fixes a date to the circumstances to which he deposes, by stating that they occurred after the second confinement at Box, he is, in truth, speaking to that which took place after 1822.

With this observation, I proceed to direct my attention to the evidence on the allegation, as given in on behalf of the opponents of the will. Mr. Osmond, the bootmaker, does not attempt to fix any date, neither does he refer to any confinement at all; and according to his statement, from 1817, the deceased was an idiot, and so he describes him to have been, and always the same. He says he never had but one conversation with him; his books are destroyed, therefore he has no opportunity of fixing the date. Now, no doubt, this person is speaking truly to the best of his memory; and again, the real question will be, whether, on the balance of the whole evidence, he is mistaken as to time or not. But I must observe of this witness, and several others, that their opinion is formed, not from any personal knowledge of the testator, but merely from his outward appearance and conduct, which, as they describe, was that of a person suffering under the calamity of lunacy. Now, I need not, I think, go through the evidence of all these witnesses in detail, for it goes to this point, if correct in their dates, they prove unsoundness of mind; if incorrect, the evidence can have no bearing on the issue in this cause. Their evidence must be tested by other proved facts, and then the balance must be struck. However, I must make an observation upon the evidence of Burt, who had been for many years servant to Mr. Frederick Bannatyne. Burt most distinctly proves a state utterly inconsistent with idiocy subsequent to the first return from Box, and though he cannot speak of any particular year, he as clearly fixes the duration of that state as lunacy, until after the second return from Box in 1822, for then, he says, he first saw any proof of unsoundness of mind. This is a witness in support of the averment of unsoundness of mind; in fact, Burt is really a most important witness to assist in discovering the truth, for he furnishes the means of reconciling, in a great

degree, all the conflicting testimony. It is he, too, who proves that Palmer, who had been an assistant at Box, lived with the deceased on his return in 1817, not as keeper, but as servant. Now, that is a fact of no small consequence, because *prima facie* it would be natural to conclude that a keeper taken from a receptacle for lunatics would be employed for a patient just removed from that establishment, in the same capacity of keeper, and that would fairly raise an inference against the cure; and a very strong inference it would be, if Burt had not explained the transaction in the manner he has done; but his evidence not only contradicts the article, but rebuts the presumption that would have arisen from it. I now pass on to the evidence of Mr. Valobra. Whatever else may be said of his testimony, it clearly contradicts and disproves the case pleaded in the allegation on which he has been examined, for the case set up is unsoundness of mind from 1815, whereas this gentleman proves sane conduct from 1815, or 1816, for several years. Miss Blencowe is a witness *sui generis*. She is the only person who blends together into one incongruous mass, the amusements and habits of a man of sound mind with demonstrations of weakness and imbecility. According to her evidence, the deceased was always the same from the very first to the last, from 1817, to the latter period of his life — when dancing with herself and some of the other young ladies of Bath, as when confessedly idiotic, after 1822. Whatever may be the real truth of this case, this statement is clearly impossible. He could not have been going into society and dancing at balls, if he was in the condition he was proved to have been in 1822. He could not have conducted himself as Miss Blencowe says he did, “upon all such occasions,” as a gentleman of strict propriety and decorum — not quite, I think, altogether the conduct usually ascribed to an idiot.

Before I close my observations on this evidence, I will briefly advert to the deposition of Mr. Waldron, for he is a medical man, and, if his memory serves him, should be capable of giving his testimony with discrimination, which cannot be expected of witnesses of a lower class. This gentleman, to repeat the observation, which must be repeated on this occasion, as from the lapse of time might reasonably be expected, is not very accurate in his dates. He is examined in 1850. He states he was in the habit of meeting the deceased in society, and at balls, when he first became a subscriber, twenty-seven years since; that would be in 1823, after the deceased had come back the second time. Now, that is manifestly a mistake, or, if not a mistake, it would tend to prove that even after 1822 the deceased had not become so imbecile and so idiotic as to be excluded from society. But it is very difficult to fix any date at all to the evidence of this witness. First, he speaks to having known the deceased for thirty years, then for twenty-seven; then, in the latter part of his evidence, he goes back to 1817, which would be thirty-three years. I mention this not to find fault, for the best memory might fail in deposing to matters after so many years, but to show how difficult it is to rely upon such evidence as applicable to any particular period; and its connection with the year 1820 is the all-important fact in this case as

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applicable to that period. All this witness can say is, it was not a great deal that he saw of the deceased, even when he used to meet him in society, but that, from the first, he should have said that he was unequal to the management of his affairs. This evidence advances the case but very little, even though he swears that between 1817 and 1823 the deceased was an idiot. Mr. Houlton considers the deceased as a species of idiot from 1815; he describes him as stooping and bent in the back from the very first. Now, compare this statement with Burt's, and it will appear that if Burt is true, Mr. Houlton must in this respect be mistaken. I give credence to Burt, because his memory is evidently strong as to all the facts, and he states that his appearance antecedent to 1822 was of a totally different character; but in 1822 the fact was, that he then became stooping and bent in the back, and, in short, had an idiotic appearance. Mr. Philip George had no knowledge personally of the deceased, but in 1839 he was one of the commissioners in the execution of a commission in the nature of a writ *de lunatico inquirendo*. His evidence in chief merely proves what is established by the formal documents produced in the cause. He has now been cross-examined, and, as I think, with extraordinary courage. His answers would, if admissible evidence, give the contents of Mr. George's notes taken at the inquisition, and they would give a part of the evidence of Dr. Langworthy before the commissioners. Now, I have given some consideration to the question, how far this part of Mr. George's answers is admissible evidence as to the issue whether the deceased was of sound mind at the time of making the will, and I am inclined to think it is not evidence for that purpose. I apprehend it to be quite clear, that the notes of Mr. George could not have been made evidence in chief on either side as to the main issue, and I do not see how the extraction by interrogatory makes any difference; but I do think that those answers might be evidence, as I have hinted before, to the extent of showing that Mr. George had a good foundation and reason for the statements he has made in answer to the interrogatory put to him, because he is asked whether this inquisition was not hastily and carelessly conducted. He says, "No, it was not;" and he is asked especially with reference as to there being no lucid interval. He says, "No." "I am justified in saying it was not carelessly conducted, because Dr. Langworthy does so swear." And I think, in order to establish Mr. George's credit, the interrogatory is good evidence; but as to the main issue in the cause, that is quite another story. The important part, it may be as well to advert to it, is this — after having stated who was examined in the case, he says, "It certainly was not principally, or in any measure, from the evidence of the said Pritchard, that the lunacy of the said deceased was carried back to the year 1815. It was upon the evidence of Dr. Langworthy, corroborated by that of the said Mr. Sugden, the family medical man, and, as appeared, the regular medical attendant of the deceased himself, when away from Dr. Langworthy's, that the lunacy was carried back to that period. The said proceeding was not, as suggested, conducted by any means in a loose manner; it was wholly unopposed by any person on behalf of the

deceased. The deceased was produced in person before the commission, and it was from the then personal appearance and manners of the deceased, coupled, however, with the evidence of the parties just mentioned, than which nothing could be stronger or more conclusive on the point, that the jury felt no hesitation in pronouncing him to be of unsound mind. I did then, and do now, consider that the said proceeding was instituted for the purpose only of enabling the friends of the deceased, in his then state of mind, to put himself and his affairs under proper supervision and control. I am not aware whether or no the carrying back the period from which his mental incapacity commenced was merely formal, and devoid of any particular object. The propriety of carrying it back to that period was fully borne out by the evidence of the two medical men." He gives an extract from the evidence of Mr. Sugden; and upon two preceding interrogatories, the eleventh and twelfth, he gives extracts from Dr. Langworthy's evidence. He says he was discharged in 1817 in a more tranquil state, relieved, but not cured; and upon the twelfth interrogatory, that in December, 1818, the deceased was again admitted into his asylum, where he remained until July following. Now, if I am mistaken in my view of the law on this subject, and if all those extracts from Mr. George's notes are really admissible evidence as to the main issue, and upon the principle that whoever puts an interrogatory, must take the answer, even if that answer would not originally have been evidence, then let me consider the effect of such presumed evidence. I do not consider it evidence, but I will consider the effect of it as if it was so. Does it carry the case beyond the verdict of the jury? In all respects but one, I think not. I have already said that I am bound to presume the verdict of the jury, that the deceased was of unsound mind, is justified by the evidence adduced. Those extracts from the evidence of these witnesses do no more, even the statement of Dr. Langworthy, than show that the deceased left in 1817 relieved, not cured; they do not go beyond the verdict of the jury. These words do not necessarily imply continued unsoundness of mind, but that the cause of the decease was not removed; and looking to the subsequent recurrence of the malady, whether in 1818 or 1822, the deceased was not, in any proper sense of the word, completely and entirely cured; the same cause, however quiescent for a time, produced a recurrence. Evidently the most important fact supported by these extracts, if it be a fact, and receivable in evidence, is, that the deceased was again admitted into Dr. Langworthy's asylum in December, 1818, and remained till July, 1819; for it is a fact, not only important as such, but most important, as fixing a date to the evidence of the witnesses, who depose to incapacity after the deceased was sent the second time to Box. These extracts might possibly make that evidence to take effect from a period antecedent to 1820, and not after 1822.

I have already stated, in examining the evidence taken on the fifth article of the allegation offered against the will, some of the reasons why it appears to me improbable that the deceased should return to the asylum at the time specified; but I will again advert to this sub-

ject, because it is deeply important. I must, however, observe that it is very difficult — and it is but justice to say so — to conclude that Dr. Langworthy could have made a mistake as to a matter so peculiarly within his own knowledge, and as to which he must, if Mr. George's notes be correct, have spoken with so much particularity as to dates; for it is from December, 1818, to July, 1819. Perhaps, then, it would be safer for the moment, and for the purpose only of this investigation, to assume the fact to be as Dr. Langworthy is said to have stated it, and to give the opposing party the benefit of it as a fact, but not, for the present, as a fact affixing a date to other evidence. That it is a fact of importance I confess; but I do not think in this case it is one of paramount importance towards the conclusion of the case. It is important as showing an increased liability in the deceased to a return of his disorder — as showing a shorter period of freedom from restraint; but still the question remains — what was the condition of the deceased from 1817 to the end of 1818, and whether from July, 1819, till after the making of the will, there was any essential change? It is now time, having made these observations upon the evidence in support of the case of the opponents of the will, to advert to some part of the testimony of the witnesses produced on the allegation given in on behalf of the two gentlemen setting up this will. Before entering upon this branch of the case, I must bear in mind what the nature of the case set up in opposition to the will is. I must repeat that it is not lunacy — it is not monomania — it is not any species of mental disorder, the symptoms of which it may, at periods, be difficult to detect; but the case presented is that of idiocy or imbecility, the characteristic of which is permanence, with little or no variation, though often, in the case of idiots, it does sometimes happen that there will be a greater degree of excitement demonstrated than at other periods. How is such a case to be met? I apprehend to meet it, and to show that such a state of things did not exist at any given period, proofs of acts of business are most important evidence. Many acts of business could possibly be done by a lunatic, and the lunacy not detected; but it is scarcely possible to predicate the same of an idiot or an imbecile person. I shall look, therefore, in the first instance, to the acts of business. It is proved by Mr. Falkner, that the deceased kept an account with Messrs. Tuckwell, at Bath, for four years, from 1818 to 1821, and during all that period occasionally drew drafts, and all those drafts were paid to himself over the counter. The first is dated the 31st January, 1818; the last, May, 1820. According to the evidence, the deceased came himself to the counter, and there is no proof of any one accompanying him on such occasions; he asked for the sum he wanted; the clerk filled it in, he signed it, and took the money. Surely no idiot could have done this, for he must have exercised thought to go to the bank, memory and judgment as to the sum required; and moreover his conduct and demeanor could not at such times have been as described by the witnesses against the will, or, from the glaring colors in which his imbecility is depicted, it must have been discovered, and the business never could have been transacted at all. I think it quite useless

to go into all the transactions with Messrs. Coutts; they are of the same character; they give rise to the same observations, and suggest the same arguments in opposition to the evidence describing his imbecility at that period. But the date of the drafts is of very great moment. Dr. Langworthy is stated to have said that the deceased was an inmate of his house from December, 1818, to July, 1819; but there is a draft in January, 1819, and a draft paid over the counter, and consequently, the deceased must have been at the banking-house to receive the money on that day; and which fact depends, not on the memory of Mr. Falkner, for that might be treacherous, but on the very form of the drafts themselves, such drafts, and which are exhibited in this cause, being those only which are used at the counter. The checks are all filled up by Mr. Falkner or Mr. Penny, then the clerks. The deceased must have been personally present. Now, can it be conceived he came from Dr. Langworthy's, in a state of imbecility or idiocy, at that time? Is it possible to conceive that is so? Such a conclusion is, I think, revolting to all probability. But the case does not turn upon this single draft; there is another of the 4th May, 1819, and another of the 21st July, in the same year. Recollect, Dr. Langworthy's period being from the month of December to the month of July. Then I might go on, and speak of the subsequent period. There were drafts in the months of February, May, and July, 1820. All this evidence coming from Mr. Falkner is further strengthened by the transactions with Messrs. Coutts. There are money transactions in 1817, 1818, 1819, and 1820, immediately before and after the date of the will, and even as late as 1821. There is a draft and a purchase of stock in February, 1819, when he is said to have been at Dr. Langworthy's, and in May and July, 1819, when he is said to have been there; and the account ends in 1821, when the deceased, according to all the evidence, is said to have become incapable. Why such accounts should have been carried on in 1821, if he had really been unfit for business before and during all that interval, is a point upon which I have not heard a shadow of explanation. I consider these transactions, then, of first-rate importance towards solving all the difficulties of this case; for here, after the lapse of about thirty years, the court has the advantage of facts proved, with the dates duly affixed to them. I do not say that these facts alone utterly disprove that the testator was at Box at the beginning of 1819, but they go a long way towards it; and even if at some time thereabouts the deceased was at Box, they do prove that the deceased did acts of business requiring what I think cannot be denied, some thought and some understanding. There is, I must say, not the least evidence to show that in any one of these acts of business the deceased was assisted by any one person whatever — the presumption is the other way; and to put these acts upon the very lowest basis on which they can be placed, they do utterly disprove idiocy or imbecility. I will simply repeat, what I have already indeed said, that those who are afflicted with lunacy sometimes have the management of and can manage their pecuniary affairs — an idiot never.

Now, the next branch of evidence is, in my opinion, almost equally instructive; it is the evidence of dealing with tradespeople. Jones,

the sadler, has given his evidence in a manner extremely creditable to himself; he is supported by strong corroborative proof in all his statements. In his examination on the second and third articles, he states that he worked for him and his three brothers. What I am about to state will show that this man was careful in what he did—that his first recollection of the deceased was ordering of him on the 16th August, 1817, a saddle. He says he does not find, by his books, he did any thing for him before. From that time, by reference to his books, it appears that he worked for the deceased occasionally up to the 9th November, 1821. He gave orders himself, he paid his bills himself, he knew the value of money, and was careful to settle the price before the order—very particular, in joint accounts with his brothers, that he should not be charged beyond his fair proportion. The accounts not only confirm the witness, but bear strongly on two essential parts of the case.

First, as to the confinement at Box in 1818 and 1819, there is an entry on the 29th December, 1818, and in March, April, May, and June, up to July, 1827, covering the whole period when it has been supposed that the deceased was at Box. It was argued, I think rather desperately, that the bill was inconsistent with the fact of the deceased being at Box, and the items might have been incurred through a servant. This attempted explanation is not only not very probable, but is, as I have said, inconsistent with the evidence of the witnesses. If, however, all this is not sufficient, it comes out most unexpectedly on interrogatory, that, upon looking at a previous ledger, Jones was working for the deceased and his brothers at different times through 1815, and that he did not work for him, the deceased, in 1816. In that year the deceased was certainly at Box, so that there is an entire intermission of work at that period, as might rationally be expected, but there is a continuance of work in 1818 and 1819, and if the deceased was at Box at that time, why should there not have been a cessation of work in 1819, as there was when he was at Box in 1816? I have no doubt of the truth of this man's evidence. I have dwelt the more strongly upon it, not only on account of the intrinsic weight of the fact of his not being at Box in 1818 and 1819, but as to the collateral effect of fixing a date to the evidence of all the witnesses.

Secondly, it is not to be forgotten, in the examination of this evidence, that some of those dealings come very close to the very period of making the will, in 1821. Of the same character is the evidence of Mr. Moore, who was a bootmaker in Bath from 1818 to 1822, and I refer to him more especially, because of the date of 1820—the great date in this cause, when his father died—a date as to which he could not easily be mistaken. He was more intimate with the deceased than tradesmen usually are with their customers; he sat by him in his tandem, and it appears by Jones's bill that harness for a tandem was furnished in 1820. Another witness speaks to the same period, and he fixes the date by reference to a marriage in 1820, and to a bill dated September, 1821. The conversation detailed as to that bill, which I need not go through, is evidently the conversation of a rational man. I forbear adverting to more evidence of this

kind, though there is no want of it, considering the great lapse of time. I cannot, however, pass wholly over the evidence as to the social habits of the deceased. Mr. Caldecot, a witness who is admitted to be a witness of perfect respectability, knew the family from 1813, knew the deceased from 1814, saw him in Box in 1815 or 1816, saw him on his return to his mother's house in 1817, and of the period from 1817 to 1822 he speaks in the following terms. He says — "I was in the habit of constant intercourse with him, meeting him continually in society." He says he was of perfectly sound mind, and had the management of himself and his affairs. He speaks of his attending divine service, and there is also evidence of his taking the sacrament. That this gentleman is not incorrect in his dates is proved by an abundance of evidence as to the deceased, during the period in question, being a subscriber to public balls and billiard-rooms. I will only add that the evidence of Mr. Caldecot strictly applies to August, 1821, because he states he was at Bath at that period, and up to the month of October in that year, and constantly saw the deceased. It appears to me, that on this part of the case there is only one more witness whose evidence requires comment, and that witness is Vining. He went into the service of Mrs. Bannatyne about 1816. I draw no conclusion in favor of soundness of mind from his evidence of the deceased coming over with Dr. and Mrs. Langworthy to dine at his mother's in 1816, for I consider that fact is only a proof of greater quiet and greater composure. But this witness was an inmate in the family, and if there does not appear reason to distrust his memory, or to doubt his integrity, he must furnish the best evidence as to facts and dates. In 1817, he says, Mr. William Bannatyne was married, and the deceased came over from Box at that time, and remained till 1822; he positively denies that the deceased was at Box during the interval. He goes on to depose to the acts the deceased did — his care of his money, his constant attendance on divine service, his freedom from all control, his dealing in horses, his keeping a tandem jointly with his brother George, his going to parties, and his playing at cards. The opinion of the witness is not of great value, but it is in conformity with the facts he states; and it is upon the facts the court places reliance.

Now, I have gone through all this evidence, perhaps in greater detail than is necessary, partly from a wish to satisfy the parties that I have omitted nothing that could bear on the ultimate decision of this case, and partly because I bear in mind that there is in law what I may call a double presumption, against the validity of this will — a presumption arising from the verdict — a presumption from proved unsoundness of mind previous to the will, which presumptions throw upon the party propounding a very heavy *onus* of establishing satisfactorily the soundness of mind of the testator when he did the act, and because, also, incapacity is admitted after 1822. This brings me to the consideration of the first plea in the cause, and very briefly to the evidence thereon, and to the will itself. The contents of the will are very simple; they are beyond all doubt rational, and, as I think, natural and officious, looking at the circumstances in which

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the deceased was then placed. He was a bachelor, with a mother, three brothers, and a natural child: he provides for that child by a legacy of 4,000*l.*, and he introduces conditions for its maintenance, showing that either he, or somebody for him, had bestowed much thought upon the question—a duty, of course, he was bound to discharge. He gives a life interest to his mother in the residue, and on her death it goes to his three brothers. I really cannot conceive a more unexceptionable document. The operation now may, to a certain extent, become different by the death of one of the legatees before the testator; but that is no argument at all, for there are thousands of wills, thousands on thousands, which do not provide for future contingencies—thousands in which we all know there are lapsed legacies, and the property goes in a channel not accordant with the intention, or what a person might think a just and proper channel; but especially after the lapse of twenty-nine years, where the testator survived the making of the will twenty-nine years. The only thing to be wondered at is, that the will could be so far carried into execution, if established, as it is. The will is in the handwriting of Mrs. Bannatyne. I know not what the amount of the property was at the time. I wish I did, for the reason I am about to state. But the 4,000*l.* given to the child being deducted, it may be a question of doubt, looking at the mother's probable age, and the length of time the deceased lived, and the amount of his fortune, whether she might not have been equally benefited by an intestacy, because I am now looking to the question whether she was an interested party in making this will. I have no means of forming a judgment—I mean in the strict and proper sense of the word—whether she would have been more interested under an intestacy or by the will; it might have been—I think it is not on the present occasion—a point of great importance. The employment of his mother for this purpose is a fact not wholly unimportant—the employing his mother, instead of writing the will with his own hand. It is a very short document, one which, *à priori*, a man would write for himself; and I am aware also that all the other documents are, as to the body of them, written by his mother.

But this fact rather strengthens the observation I think it right to make, namely, that I do think that an inference fairly arises, from the fact of the will itself and all other documents being in the handwriting of the mother, not of insanity or idiocy, but of great inertness and great indolence, probably not wholly unconnected with the decease with which he was before and afterwards afflicted. This will was inclosed in an envelope, in which is contained certain writings of the mother. I am of opinion that I am bound by legal rules not to admit the paper as evidence in support of the will; for what is it more or less than a written declaration? I cannot admit it in support of the will, unless, indeed, it could have been shown that Mrs. Bannatyne would have taken, under intestacy, a greater amount than she would under the will. But if it be the other way, and she is benefited by the will, it is impossible I can receive this declaration as evidence in support of the will. But presuming Mrs.

Bannatyne to be benefited under the will, and she being dead, all that she has written would be evidence against the will, and might be used for that purpose, because the declarations of deceased persons interested are entitled to be received against themselves, though not for themselves. I, therefore, make no observation upon what is written in the envelope, because I do not think it was argued at all, that what was written in the envelope could be used as evidence in favor of the will. Now, the will is attested by two respectable persons, both dead. The presumption is, that they had every reason to believe that the testator was of sound mind, and that it was done by him in a rational manner, and it is evidence of his conduct at the time; and this presumption is not the less strong because of the death of the witnesses. It would be a great calamity, where attesting witnesses fall according to the common lot of mortality, that their evidence should be lost to the individuals benefited under the instrument they attest; and for this reason I am bound to presume, looking at the will itself, and looking at the attestation of the witnesses, that this is a rational act, done in a rational manner. In the opinion of a very great judge, Sir William Wynne, in the celebrated case of *Cartwright v. Cartwright*, he said where a rational act was done in a rational manner, such was the strongest and best proof which could arise even as to a lucid interval. Now, I cannot say that I subscribe altogether to this observation of Sir William Wynne, for I do not, but it is entitled to great weight; and, to a certain extent, a rational act done in a rational manner, though not, I think, the strongest and best proof of a lucid interval, does contribute to the establishment of a lucid interval. It does not appear to me that any argument arises at all from the custody of the will. Looking at the circumstances of the case, I do not see that there was any thing extraordinary in the custody as to reflect back on the making; and that is the only point in this case. What was done with the will afterwards was not done by the testator himself, and is of no consequence whatever. [Having adverted to a letter of the mother of the deceased written in 1830, and to arguments founded on the conduct of the brothers of the deceased, the court continued:] Now, to sum up the conclusion. As against the validity of this will—I have endeavored to omit nothing, and to give, as far as I could, weight to every consideration on both sides—as against the validity of the will, I place the presumption of law, and the proved prior and subsequent unsoundness of mind, and for the purposes of the argument, all that has been extracted as to what was said by Dr. Langworthy before the jury. I take into account also, that neither the will nor any other document is in the handwriting of the testator—a strong proof that in matters of business he did not act as men ordinarily do. I give such weight as, after careful examination, I think due to the evidence brought to establish unsoundness of mind. Now, giving all these considerations their full and due effect, I am of opinion that the evidence in support of the will preponderates. The rational character of the instrument itself, the duty of providing for the natural daughter, the justice to all his relations then existing, the improbability of any unfair con-

 Thompson v. Hall.

duct on the part of so kind and affectionate a mother, the sanction of the attesting witnesses, the management of pecuniary concerns, the dealing with and conduct towards tradesmen, the perfect freedom of person, the conditional enjoyment of society and amusements, and all these circumstances applying to about the period when the will was executed, does in my judgment rebut the presumption of law, overpower the opposing evidence, and establish, if I may so call it, a lucid interval, or, in other words, that the testator was of sound mind when he executed this will. I therefore consider it is my duty to pronounce that this will is entitled to probate.

On the question of costs, which was strongly pressed,

Dr. Lushington said — Of course I was aware that the question would be mooted. I did not think it right to give any opinion on costs till after I had delivered my judgment. Upon general principles, I think the costs ought to follow the judgment, and I also think that rarely the costs ought to be given out of the estate; but I think that in testamentary causes there do arise, on several occasions, just and fair exceptions; and I am of opinion this is a just and fair exception, and I will state my reasons. In the first place, here is a will which ought to have been proved in solemn form in any case, because the will was in direct conflict with the verdict of the jury, finding the insanity to have covered the whole period. In the second place, though it could not be received as evidence in this case, the parties opposing the will were manifestly carried away and deceived by the affidavit of Dr. Langworthy, who was, I think, mistaken in the testator being at his house a second time; and with regard to any thing that might have been stated in the argument of counsel as to the conduct of this cause, I think I should be doing great injustice to the parties, who are minors, if, because, in the heat of argument, counsel did attack either one party or the other, I therefore should deprive them of what otherwise would fairly be given to them. I think this is a case in which the court ought fairly to give the costs out of the estate.

PREROGATIVE COURT.

THOMPSON and ALLAWAY v. HALL.¹

January 7, and February 6, 1852.

Attestation — Evidence of Signing in Presence of Subscribing Witnesses.

The subscribing witnesses to a will, examined two years after the transaction, deposed to seeing the deceased write on a paper, and to their signing such paper, but they would not swear to what he wrote being his name, nor to the name of the deceased being on the will

¹ 16 Jur. 1144.

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when they so subscribed. They identified the paper subscribed by them, on which was the signature of the deceased. The attestation clause was full, and the deceased knew the requisites of execution : —

Held, that, on the evidence, the will was entitled to probate.

JOHN ELTON HALL wrote a will on one side of a sheet of paper, appointing executors and disposing of the whole of his property, ending with a formal testimonium clause, followed by an attestation clause in these words — “Signed by the testator, John Elton Hall, as and for his last will and testament, in the presence of us, who, at his request, in his sight and presence, and in the sight and presence of each other of us, have hereunto set our names as witnesses.” The signature of the deceased was opposite the bracket to the attestation clause, and the names of two witnesses were under the attestation clause. It appeared that the deceased had been for some time in a solicitor’s office, and that on the day when the will was executed he was ill and in bed ; that he afterwards sailed for New South Wales, and died on the passage. Three witnesses were examined on the allegation propounding the will. They deposed to the deceased having called them into his room to witness a paper, to his observation that there must be two witnesses to that paper, to their seeing him write something on the paper, two of them signing a paper after he had so written thereon ; and they identified the will as the paper signed by them, but they would not, on cross-examination, swear that when they saw the deceased write, he, in fact, wrote his name to and signed the will, nor that they saw his name in the will when they subscribed it. They were examined upwards of two years after the execution of the will.

Jenner and Deane, for the executors, relied upon the evidence as sufficient to support the will, particularly looking to the presumptions furnished by the testator’s knowledge of what was required, and the wording of the attestation clause. They referred to *White v. The Trustees of the British Museum*, 6 Bing. 310, and *Hudson v. Parker*, 1 Robert. 14. *Ilott v. Genge*, 3 Curt. 160, was clearly distinguished from the present case, for there the witnesses who subscribed their names saw no writing at all, and their impression was, that the deceased did not sign the will in their presence ; the contrary being the case here.

Harding and Twiss, contra. Whatever may have been done by the deceased in the presence of the witnesses, they were merely present bodily, and not mentally ; they were not cognizant of what he did, and so they cannot now depose that the will was signed when they subscribed it ; they are not, consequently, able to support the execution in the manner required by the law, and pointed out in *Hudson v. Parker*, 1 Robert. 24, since, to use the words in p. 25 of that case, the signature here is not proved to have been existent or seen at the time.

Dr. LUSHINGTON. The deceased in this case is John Elton Hall,

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and the question for the decision of the court is, whether a will, bearing date the 16th April, 1849, is entitled to probate or not. The objection to probate of this will is, that it was not executed according to the provisions of the Wills Act; and no doubt, if that objection is sustained by the evidence, it must prevail, however clear the testator's intention may be, and however undoubted the fact of the execution of the will; if informal, it cannot avail. I have ever been of opinion that no court of law — and such is a court of probate — has any other duty than to construe the statutes of this realm according to the ordinary rules of construction, and that, without any regard to the consequences, if once satisfied that they are the legitimate result of a true construction of the statutes, the consequences and the results therefrom belong to the proper province of the legislature, and not to a court of law. I hope that so far as I have had to deal with the interpretation of this act, I have always adhered to this principle, and it is my wish to do so now. But the interpretation of an act of parliament, and the effect to be given to the evidence in a cause, are totally different considerations. These two questions ought always to be kept separate and distinct. In construing an act of parliament, I am to declare what the requisites of the law are; in construing the Wills Act, to say what the law requires to render the execution of a will valid, and entitle it to probate. In so doing I am confined to the words of the act. No extrinsic considerations ought to have the slightest weight. In considering the evidence, it is my duty to look to all the witnesses have sworn, and to weigh the whole probabilities of the case, and thence to ascertain the state of facts to which a given construction of the law is to be applied. It is obvious that this proposition, though I believe undoubtedly true, necessarily embraces a wide range — the character of the witnesses, the length of time which has elapsed since the transaction took place, and the nature of the facts to which they depose, whether they are facts likely to make an impression on their minds or not. To this is to be added, whether the case admits of the application of the principle, or the presumption *omnia rite esse acta*, or not. Now, let us see how this present case stands. The deceased was a person somewhat acquainted with the law, and therefore it is a rational and legal presumption that he intended to execute his will in conformity with the law. The presumption is strengthened by the fact that the attestation clause is strictly regular and formal. If the execution be deficient in legality, such deficiency is contrary to the intention of the testator, who had adequate knowledge of the requisites of the law, and declared by the instrument itself. Certainly this is a case in which it may be truly said, *omnia præsumenda rite esse acta*. The objection raised is, that the signature was not made in the presence of the witnesses, or acknowledged as the 9th section of the act requires — that it was not and could not be duly attested, if the evidence of the witnesses is to be trusted. The first step in this investigation is to solve, by reference to the evidence, when and how the signature was made — whether there is proof of its having been made before the witnesses, and before they signed, and whether the witnesses were cognizant of the

facts, or merely corporally present. And here it may be fitting to observe, that three witnesses have been examined, of the ages of nineteen, eighteen, and sixteen, at the time of the transaction, and examined two years and two months after it. What is rationally to be expected from such witnesses? I apprehend nothing more than a general statement of the circumstances occurring; that you cannot require a minute statement of facts, which, however important in themselves, were not calculated to make much impression on their minds. The writing on the paper in the actual presence of all three is proved. What was written? They will not swear that they saw the deceased write his name, but that they saw him write something. What is the probability from all these facts? — a skilled testator writing, and occupied in so writing the just time to write his own name, and followed by attestation. The name now appearing as it does on the will, would it not be contrary to all probability to suppose that any thing was written but the name, or that the name was not there and written before? But it has been argued that all this may be true, but that as the witnesses did not see the testator write his name so as to swear they saw the letters made — that though corporally present, they could not, in the proper meaning of the word, attest the signature. I think that this argument, even if well founded in law, is totally opposed to the real state of facts, as, I think, they must be collected from the evidence. Now, suppose you were to ask an attorney or his clerk if they saw the testator sign; they would answer "Yes." If asked how they came to remember such fact, the answer in all probability would be, that they believe so because they are accustomed to be careful in the execution of wills. Then ask the next question, "Are you sure you saw the testator make the very letters which form his name?" would not the answer be, "I saw him write letters on the will, and then I attested it." Put a further question, "Were you not at the foot of the bed, and can you swear that, as the letters would be backwards as you stood, you saw all the letters?" who, after the expiration of two years, would be able to give a positive affirmative? Can any court expect it of these young men? I am satisfied that the evidence is sufficient in this case, that the witnesses had the ordinary knowledge that witnesses have of the signature made by the testator, and that it was made in their presence and with their knowledge. I think that these are the fair deductions from their evidence; but even if this were not sufficient, I am of opinion that I should, in the circumstances of this case, be bound to supply the deficiency by attributing it to want of memory. I disturb no case or decision. I have given my reasons for my judgment; but if I look for authority, *Newton v. Clark*, 2 Curt. 320, will fully support my judgment.

In the Goods of J. M. Boschetti.

PREROGATIVE COURT.

In the Goods of J. M. BOSCHETTI.¹

August 5, 1852.

Practice — Incapacity of Executor — Administration.

The residuary clause in a will was altered by striking out the words "to A. in trust," and substituting "to B." A. was named executor. Administration with the will as altered annexed granted to B., as interested in the residue, A. being incapable of acting, and proceedings being taken in chancery to ascertain the construction of the residuary clause.

J. M. B. died, domiciled at Gibraltar; of his will he had appointed R. A. and A. S., since deceased, and J. P., executors. Subsequently he altered the residuary devise and bequest to the trustees and executors by striking out the words "the said R. A., A. S., and J. P., and to their heirs, administrators, and assigns forever, upon the several trusts, nevertheless, and for the ends, intents, and purposes, hereinafter expressed and declared," and interlining in their stead the words "my daughter J. F. B." Probate of the will as originally executed was granted by the court of Gibraltar to the three executors; but that sentence was appealed from by the daughter J. F. B., and the judicial committee of the privy council ordered that grant to be revoked, and a new probate, with the alterations, was thereupon granted to J. P., who was the surviving executor. In 1851, J. F. B. being about to file a bill in chancery against certain persons, with a view of determining the effect of these alterations, administration, limited to substitute such proceedings, was granted by this court to C. J. C., as the nominee of J. F. B.; and on that cause coming on for hearing before the Master of the Rolls, he was pleased to order the matter to stand over, in order that a general representative of the testator might be constituted. Accordingly a requisition issued to swear J. P., resident at Gibraltar, as surviving executor, but he was too ill to be sworn.

Addams moved the court to rescind the decree granting probate to J. P. and to direct a decree to issue, with intimation, citing J. P. to accept or refuse probate, or show cause why administration with the will annexed should not be granted to J. F. B., as interested in the residue. He referred to Wms. Exors. 405, 3d ed., and the cases there cited.

SIR J. DODSON granted the motion as prayed.

¹ 16 Jur. 894.

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☞ In this Index the cases in the Ecclesiastical Courts are denoted by the abbreviation (Ecc.) — all other cases are at Common Law.

Common Law, etc.

ABANDONMENT.

1. *Non-user.*] Whether mere non-user of a right amounts to an abandonment of the right, will depend upon the circumstances which caused the non-user. *Ward v. Ward*, 413.
2. *Intention.*] Therefore, where the use of an immemorial right of way to a close, was discontinued because the occupiers had a more convenient access to it over another close in their occupation :—
Held, that the non-user afforded no evidence of an intention to abandon the right. *Jb.*

ACCEPTANCE.

Of Bill of Exchange.]

See BILL OF EXCHANGE. .

ACCEPTOR.

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See BILL OF EXCHANGE.

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See LARCENY.

ACCORD AND SATISFACTION.

Satisfaction by a Stranger.] To an action in *indebitatus assumpsit* for work and labors, the defendants pleaded that the debt accrued to the plaintiff under an agreement, by which the plaintiff agreed with the defendants to execute certain works, on certain terms, set out in the plea; that the plaintiff, after he had commenced the works, stopped the same until another agreement was made with the plaintiff and one T. P., set out in the plea, and by which the plaintiff agreed with the said T. P., for certain considerations, to finish the said works; that the consideration money, under the last agreement, was paid, and that the plaintiff accepted the same from the said T. P. in full performance of such agreement; and that the plaintiff accepted the last-mentioned agreement, and the performance thereof by the said T. P., in satisfaction and discharge of the said agreement between the plaintiff and the defendants :—
Held, a bad plea on general demurrer. *James v. Isaacs*, 296.

ACTION.

On Contract unexecuted.]

See CONTRACT.

Common Law.

ACTION.

Right of — in whom.]

See JOINT-STOCK COMPANY.

ACTION ON THE CASE.

When it lies.] A lessor may sue in case for injury to his reversion, though the injury is the working a mine, contrary to the terms of the lessee's covenant, and for the committing of which an action on the covenant would lie. *Marker v. Kenrick*, 320.

ADMINISTRATION.

Incapacity of Executor.] The residuary clause in a will was altered by striking out the words "to A. in trust," and substituting "to B." A. was named executor. Administration with the will as altered annexed granted to B., as interested in the residue, A. being incapable of acting, and proceedings being taken in chancery to ascertain the construction of the residuary clause. In the goods of *Boschetti*, (Ecc.) 600.

ADULTERY.

See PLEADING.

AFFIDAVIT.

Sworn to before Attorney.] An affidavit cannot be used in support of an application to the court, if it be sworn before a commissioner who is acting in the matter as attorney of the applicant, though there be no action pending and no attorney on the record. *Gray, in re*, 36.

See INSPECTION OF DOCUMENTS. PRACTICE.

AGENT.

See DISTRESS. PRINCIPAL AND AGENT. SHIPS AND SHIPPING.

AGREEMENT.

See RAILWAYS. STAMP.

Illegal.]

See RAILWAYS.

ALEHOUSE ACT.

Penalty to whom.] A penalty imposed under the Alehouse Act, by justices for a borough which has a commission of the peace, but no Court of Quarter Sessions, is payable to the treasurer of the county in which such borough is situate, and not to the treasurer of the borough on account of the borough fund:—

Held, that the defendant was properly convicted upon an indictment for neglecting and refusing to pay over one moiety of a fine imposed under the 9 Geo. 4, c. 61, to the treasurer of the county of N. *Regina v. Dale*, 552.

Common Law.

AMENDMENT.

1. *Ejectment.*] The declaration in ejectment stated a joint demise by H., and M. his wife. Proof that H. was devisee in trust for the sole use of M.:—
Held, that the judge had no power under the 3 & 4 Will. 4, c. 42, s. 23, to amend the record by striking out the name of M. in the demise. *Wilton v. Beck*, 255.
2. *Variance.*] *Semble*, (per MAULE, J.) That the variance was in a particular material to the merits. *Ib.*

ANNUITY.

Recovery of Money paid.] E. H. L., who resided at Sydney, New South Wales, being entitled to an annuity for his life, assigned it, in 1849, to certain trustees, to dispose of it for his benefit. The plaintiff entered into a correspondence, by letter, with the trustees, upon the subject of the purchase, and from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon and settled until the 28th of February, 1849. Upon the 6th of that month, the annuitant died. The purchase-money was paid by the plaintiff, in ignorance of the fact, and was ultimately received by the executrix of the deceased.

Held, that, as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase-money from the executrix, on the ground that the money had been paid without consideration. *Strickland v. Turner*, 471.

See CONTRACT.

APPEAL.

To the House of Lords.] A plea which does not merely raise an objection to a particular form of proceeding, leaving it to the plaintiff to proceed in a different form at another time, but which, if allowed, entirely bars the plaintiff from his remedy, is a peremptory and not a dilatory plea, within the 6 Geo. 4, c. 120, s. 5, and a decree thereon may be subject of appeal to the house of lords. *Geils v. Geils*, 1.

2. *Dilatory Defence.*] A Scotchman was married in England to an Englishwoman, and then returned to Scotland, where he was domiciled. Some years afterwards, the wife quitted Scotland, and returned to England, where she lived separate from her husband. He came to England, and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and on that charge prayed for a divorce *a mensa et thoro*. Judgment was given in her favor. The husband returned to Scotland, where the wife instituted a suit for a divorce *a vinculo*. The husband pleaded the proceedings in the Arches Court as a bar to further proceedings in Scotland:—

Held, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this house. *Ib.*

See PRACTICE.

APPEARANCE.

See PRACTICE.

APPORTIONMENT.

See CONTRACT. CONDITION PRECEDENT.

Common Law.

ARBITRATION.

1. *Award — Several issues.*] Where matters in difference in a cause involving several issues are referred to arbitration, the costs of the cause to abide the event, the award is good notwithstanding there is no specific finding on each issue, if it appear by necessary intendment that the arbitrator has disposed of all the issues :—
2. *Seemle*, that it is otherwise, where the reference is of the cause and also matters in difference. *Humphreys v. Pearce*, 495.
3. *Award.*] Agreement that arbitrator should award a money compensation for the damage, or instead thereof actual repairs of the damage done. *Newbold v. The East Lancashire Railway Company*, 508.

See FRIENDLY SOCIETY ACT.

ARREST.

Attorney's Clerk — Privilege.] The managing clerk of an attorney is not privileged from arrest while going to attend before a judge at chambers, on business of his master. *Phillips v. Pound*, 523.

Right of Officer to Arrest.]

See TRESPASS.

ARREST OF JUDGMENT.

See INDICTMENT.

ASSESSMENT.

See RATES.

ASSESSMENTS.

Liability of Shareholders for.]

See JOINT-STOCK COMPANY.

ASSESSORS' NOTES.

See PRACTICE.

ASSIGNMENT.

Of a Chose in Action.]

See LEGACY.

ASSIGNEES.

Right of to bring Actions.]

See BANKRUPTCY.

Rights of.]

See INSOLVENT.

ASSUMPSIT.

1. *Money Lent — Insolvent Bank.*] M. W. deposited certain country bank notes, payable in London, representing 80*l.* in value, with a banking company, and received the

Common Law.

following memorandum, signed by the manager:—"Received of M. W. 80*l.*, for which we are accountable. 80*l.*, at 3*l.* per cent. interest, with fourteen days notice." The notes were sent on the same evening by post to the London agents of the banking company, and presented on the next day, and refused payment. They were transmitted by that night's post to the banking company, who on the following day gave notice of dishonor to M. W., and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M. W. made the deposit with the banking company, but that neither M. W. nor the banking company were then aware of this.

Held, that under the above circumstances, M. W. could not maintain an action, either for money lent or for money had and received, against the banking company. *Timmis v. Gibbins*, 64.

2. *To recover Money Paid.*]

See ANNUITY.

3. *To recover Money Paid.*] E. H. L., who resided at Sydney, New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to certain trustees, to dispose of it for his benefit. The plaintiff entered into a correspondence, by letter, with the trustees upon the subject of the purchase, and from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon and settled until the 28th of February, 1849. Upon the 6th of that month, the annuitant died. The purchase-money was paid by the plaintiff, in ignorance of the fact, and was ultimately received by the executrix of the deceased:—

Held, that, as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase-money from the executrix, on the ground that the money had been paid without consideration. *Strickland v. Turner*, 471.

See FRAUDS, STATUTE OF. STOPPAGE IN TRANSITU.

ATTESTATION.

To a Will.]

See WILL.

AUDITOR.

Overseer's Account.] The auditor of the accounts of overseers disallowed a sum which was part of the costs of defending an appeal by a railway company against a poor-rate to which the company were assessed, and stated the following reasons for his disallowance:—"First, that the overseers ought, prior to incurring those expenses, to have summoned a vestry, and taken the opinion of the inhabitants as to the propriety of doing so. Secondly, that after the quarter sessions had reduced the assessments, subject to a case, the overseers ought to have summoned a vestry, and taken the opinion of the inhabitants on the propriety of proceeding with the case." On the bringing up of the disallowance of the auditor, under sect. 35 of stat. 7 & 8 Vict. c. 101:—

Held, that the overseers having acted *bonâ fide*, and not improvidently, both in contesting the appeal and in abandoning the case reserved, the disallowance was wrong. *Regina v. Street*, 172.

AVERAGE.

See SHIPS AND SHIPPING.

AVOWRY.

See REPLEVIN.

Common Law.

AWARD.

See ARBITRATION.

BAGGAGE.

See COMMON-CARRIERS.

BAIL.

Special Bail by Executors.] The general rule that, where an action against an executor is removed from an inferior court, the defendant is not bound to put in special bail, does not extend to the case of an inferior court, where a custom of foreign attachment exists, which can only be dissolved on putting in special bail. *Bastow v. Gant*, 32.

See RECOGNIZANCE.

BAILMENT.

See COMMON-CARRIERS.

BANKRUPTS.

1. *Bills of Exchange.*] To assumpsit on bills of exchange, the defendants pleaded, that, being joint traders, by deed under the 12 & 13 Vict. c. 106, s. 224, they assigned their joint property to M., who undertook to pay their joint creditors 7s. 6d. in the pound; that six sevenths of the creditors accepted and executed the deed, and the defendants were thereby released from the plaintiff's claim. The plaintiffs replied, after setting out the deed on oyer, that each of the defendants had separate property. The replication was held good, on the authority of *Tetley v. Taylor*, 21 Law J. Rep. (N. S.) Q. B. 346; s. c. 12 Eng. Rep. 469. *Fisher v. Bell*, 245.
2. *Trover by the Assignee.*] A bankrupt, previously to his bankruptcy, deposited timber with the defendants, who were wharfingers, to be kept at their wharf, and delivered on payment of the wharfage. On the 7th of February, 1848, a *fiat* issued against him, and the plaintiff, Cannan, was appointed official assignee. The bankrupt, after the *fiat*, sold the timber, and between September, 1848, and January, 1849, it was delivered to the purchaser by the defendants, who had no notice of the bankruptcy. In February, 1849, the other plaintiffs were appointed trade assignees. In trover by the official and other assignees, held, first, that the defendants were not liable for the value of the timber, being protected by the 6 Geo. 4, c. 16, s. 84. *Cannan v. The South Eastern Railway Company*, 334.
3. *Fiat — Not Notice.*] Secondly, that the issuing of the *fiat* was not notice to all the world of its issuing, the *fiat* not standing on the same footing as the old commission of bankruptcy. *Ib.*
4. *Goods of Bankrupt.*] The words, in the 84th section, "goods belonging to any bankrupt," mean goods which belonged to the bankrupt at the time they were deposited in the possession or custody of the person delivering them, and which would have continued to be his property unless an act of bankruptcy had occurred. *Ib.*
5. *Variance.*] *Quære*, whether there was a variance between the declaration and the facts stated, on the ground that the official assignee was to be considered as alone possessed of the timber at the time of the conversion and not the trade assignees. *Ib.*
6. *Discharge in Bankruptcy.*] To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that, being a trader, he presented a

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petition to the Bankruptcy Court, under the 12 & 13 Vict. c. 106, which court appointed a private sitting, and that fourteen days before such sitting written notice was given to every person whom the defendant then knew to be his creditor, or whom he had any means of knowing to be his creditor, and amongst others to the drawer of the bill of exchange, and that he did not, at the time of giving such notices, nor did the Bankruptcy Court, or the official assignee, know that the drawer had indorsed the bill, or was not the holder, or who was the holder, or the address of such holder; that the defendant filed an account of his debts, wherein he set forth a proposal to pay his creditors 7s. 6d. in the pound; that at such private sitting of the Bankruptcy Court, the requisite number of creditors proved their debts and assented to the defendant's proposal; that the Bankruptcy Court proposed another sitting, of which the plaintiff had notice; that at such second meeting the requisite number of creditors proved their debts, and agreed to accept the defendant's proposal; that the Court of Bankruptcy then confirmed the proposal and agreement, and afterwards gave the defendant a certificate in the form in schedule A:—

Held, first, that the plea was bad in not averring that the resolution and agreement had been carried fully into effect, and the creditors satisfied pursuant to the 221st section of the 12 & 13 Vict. c. 106. *Alcard v. Wesson*, 360.

7. Secondly, *dubitante* MARTIN, B., that the plaintiff was not barred as to his debt, seeing that he had not had notice of the first sitting. *Ib.*

8. *Quære*, whether any of the creditors are bound by the certificate unless notice of the previous meetings be given to all of them. *Ib.*

9. *What Debts discharged — Contingent Liability.*] The defendant executed a bond, whereby he became liable as a surety to pay to the plaintiff such costs as the plaintiff should in due course of law be liable to pay, in case a verdict should pass for certain defendants in an action of *scire facias*; wherein the now plaintiff sued as a nominal party. The action on the *scire facias* was tried, at the spring assizes in 1848, and a verdict was found for the then defendants; after which, in Easter term, a rule *nisi* for a new trial was obtained. In November following, the defendant in the present action became a bankrupt. In Hilary term, 1849, the rule for a new trial was discharged. In May, the defendant obtained his certificate, and in August, the costs in the action on the *scire facias* were taxed, and final judgment signed against the now plaintiff:—

Held, that the plaintiff's claim was not barred by the defendant's certificate, the debt not being a contingent debt within the 6 Geo. 4, c. 16, s. 56, but only a contingent liability. *Hankin v. Bennett*, 403.

10. *Mortgage.*] Where a trader assigns part of his property, by way of mortgage, the question under the bankrupt laws is not whether putting the deed in force will put an end to his business, but whether it will make him insolvent. *Young v. Waud*, 462.

11. *Act of Bankruptcy.*] A manufacturer assigned all his machinery, by way of mortgage, to secure the amount of certain bills drawn by him and accepted by the consignees of his goods, which had been discounted by the mortgagee, and also of such other bills as should from time to time be discounted in like manner. The mortgagee was empowered, after three days' notice to enter and take possession of all the machinery, and, after a sale of the same, to pay the amount of the expenses and the bills then due or running, and to pay the surplus to the mortgagors. At the time of the execution of this deed, the machinery was worth 1,500*l.*, and the mortgagor's property consisted of goods, 1,100*l.*, and good debts, 900*l.*, while his whole liabilities were, 2,900*l.*:—

Held, that this deed was no evidence of an act of bankruptcy, although, had it been acted upon, the mortgagor could not have carried on the particular business in which he was engaged. *Ib.*

BANK SHARES.

Not within Statute of Mortmain.]

See MORTMAIN.

BEER LICENSE.

Certiorari.] A license for the sale of beer, granted by the solicitor of excise, without the production of a certificate from the overseer, required by 3 & 4 Vict. c. 61, s. 2, is not a judicial act removable into this court by *certiorari*. *Regina v. Overseers of Salford*, 145.

BEQUEST.

See LEGACY. MORTMAIN. WILL.

BIGAMY.

Evidence of Marriage.]

See MARRIAGE.

BILL OF EXCHANGE.

Acceptance — Evidence of Time of.] The bare production of a bill of exchange, with formal proof of the writing to the acceptance, is *prima facie* evidence that the bill was accepted during its currency, and within a reasonable time of the date it bears, such being the regular and usual course of business. What is a reasonable time depends on the relative places of abode of the parties to the bill. *Roberts v. Bethell*, 218.

2. *Evidence of Infancy.*] Action by indorsee against acceptor of a bill at four months' date. Pleas, that the defendant did not accept, and that he was an infant when he accepted. Proof, that the acceptance to the bill was the defendant's writing, that he came of age one day before the maturity of the bill, and resided in the same town as the drawer and indorser:—

Held, evidence for the jury, from which they might infer that the bill was accepted during the defendant's minority. *Id.*

When a Payment.]

See DISTRESS.

3. *Payment of Debt, without Costs.*] In an action by an indorsee against the accommodation acceptor of a bill, it is not a good defence to the further maintenance that, after action brought, the drawer paid the amount of the bill, and interest to the indorsee, under a judge's order in another action brought by the indorsee against the drawer. *Randall v. Moon*, 243.

What a Discharge of.]

See BANKRUPTS. PAYMENT. STOPPAGE IN TRANSITU.

BILL OF LADING.

Construction — Dangers of Roads.] The defendants received goods at Panama, to be carried to and delivered in London, "the act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers of whatever nature or kind soever excepted." The goods were stolen without violence, when in the course of transmission from Southampton to London:—

Held, that this was not a loss within the exception either of "robbers" or "dangers of the roads," as the word "robbers" meant loss by violence, and "dangers of the roads" meant either dangers of roads where ships lie at anchor, or such dangers on

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land as more immediately occur on roads, *e. g.* the overturning of the carriages. *De Rothschild v. The Royal Mail Steam Packet Company*, 326.

See STOPPAGE IN TRANSITU.

BILL OF SALE.

See SALE.

BIRKENHEAD DOCKS.

Liability for Poor Rates.]

See RATES.

BOND.

See FRAUD. RECOGNIZANCE.

BOROUGH.

Of Ashton-under-Lyne.]

See RATES.

BRIDGES.

Liability of County to Repair.] The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the Isle of Wight not repairable by tenure were repaired either by the tithings in which they were situate, or by rates in the nature of county rates, levied on all the parishes in the island, under the following arrangement. The Isle of Wight, having been assessed to the general county rate, and appeals against such assessment having been made, in 1774 an arrangement was made, by an order of Quarter Sessions, and by consent, fixing certain proportions to be paid by the parishes in the Isle of Wight towards the general county rate, but leaving the expense of bridges and houses of correction to be raised by a local rate; "the said island being adjudged and declared not to be liable to pay to the county bridge rate, or to the house of correction; the Isle of Wight agreeing to erect and maintain houses of correction and bridges within the island at its own expense." Accordingly, from 1774, the practice was for the Quarter Sessions of the county, on the application of the justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the bridges and bridewell in the island, and this local rate, and not the general county rate, was always expended in such repairs. In 1813, a local act of parliament passed, by which commissioners were appointed for managing the roads and highways in the island, and which enacted that all bridges, &c., which had, previous to the passing of the act, been repaired by any tithings, &c., should for the future be repaired in the same manner and by such ways and means as other bridges, usually called county bridges, within the island, had been accustomed to be repaired:—

Held, that all bridges which, at the time when the local act passed, were repairable by the tithings, were thenceforward repairable by the county generally; and that the conventional mode of assessing the island alone to a rate for the repairs of its bridges and bridewell, under the arrangement of 1774, could not affect the legal liability of the county, or be any answer to an indictment against it for non repair of such bridges. *Regina v. The Inhabitants of Southampton*, 116.

2. *Rebuilding of Bridge.]* A bridge in the Isle of Wight was, after the passing of the above local act wholly rebuilt by order of the justices for the island division, out of the island rate before mentioned. The construction of the new bridge was materially different from, and it stood higher up the stream than, the former bridge.

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None of the forms required by the 43 Geo. 3, c. 49, were observed in building the new bridge:—

Held, that the county remained liable to repair the new bridge. *Ib.*

3. *Foot-Bridge.*] A foot-bridge, formed by three planks, about nine or ten feet long, and a hand rail, which carries a public footpath over a small stream, is not such a bridge as the county is bound to repair. *Ib.*

BURGESS LIST.

Notice of Objection.] The notice of objection served upon a burgess, to his name being retained on the list of burgesses, should contain his description as he is described on the burgess list. *Regina v. The Mayor of Harwich*, 149.

BURGLARY.

Implements of.] Whether an implement is to be considered an instrument of house-breaking, within stat. 14 & 15 Vict. c. 19, s. 1, must depend upon the purpose for which the person charged has possession of it. *Regina v. Oldham*, 568.

2. Any implement that may be used for the purpose of housebreaking, if the jury find it to have been in the possession of the person charged for that purpose, at the time and place alleged, is an implement of housebreaking within that section, although it may also be an implement which is used in the ordinary affairs of life for lawful purposes. *Ib.*
3. Where, therefore, upon the trial of an indictment under that section, the evidence was that the prisoner was found by night, and without lawful excuse, in possession of a number of house-door keys, and a pair of pincers, all of an ordinary description, but not in possession of any of the particular implements of housebreaking enumerated in the section, and the jury found that the prisoner at the time had the keys in his possession for the purpose of housebreaking:—

Held, that he was properly convicted of the offence thereby created. *Ib.*

Choses in Action.] The prisoner was indicted for having burglariously broken and entered the house of the prosecutor, in the night-time, with intent to steal the "goods and chattels" therein. The jury found that he broke and entered the house with intent to steal a mortgage deed:—

Held, that being subsisting securities for the payment of money, mortgage deeds are *choses in action*, and as such, were improperly described in the indictment as goods and chattels, and consequently, that the conviction was wrong. *Regina v. Powell*, 575.

CALLS.

Liability of Shareholders.]

See JOINT-STOCK COMPANY.

CARRIERS.

See COMMON-CARRIERS.

Conversion by.]

See TROVER.

CASE.

When it Lies.]

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CENTRAL CRIMINAL COURT.

Removal of Indictment to.] The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 16, provides that the Court of Queen's Bench, or the commissioners under that act, being judges of the superior courts, or the judges of the Court of Bankruptcy, or the recorder of London, may issue writs of *certiorari* or other process to remove into the Central Criminal Court indictments found at the sessions for London, Middlesex, &c., for any offences cognizable by virtue of that act :—
Held, that this does not repeal the 7 & 8 Geo. 4, c. 29, s. 53, which enacts that no indictment for obtaining money, &c., by false pretences, shall be removed by *certiorari* into the Court of Queen's Bench ; but that it authorizes the several judges there specified to issue writs, in the nature of writs of *certiorari*, to remove indictments for any offences there cognizable into the Central Criminal Court from the sessions there mentioned. *Regina v. Sill*, 135.

CERTIFICATE.

See BANKRUPT.

CERTIORARI.

When it is Allowed.]

See BEER LICENSE.

See CENTRAL CRIMINAL COURT. PROCEDENDO. RECOGNIZANCE. SESSIONS.

CHARGEABILITY.

Of Paupers.]

See PAUPER.

CHARTER-PARTY.

See SHIPS AND SHIPPING.

Common Law.

CHOSE IN ACTION.

Bequest of.]

See LEGACY.

Not Goods and Chattels.]

See BURGLARY.

CLERK.

Of Attorney.]

See ARREST.

CLERK OF THE PEACE.

1. *Duty of.]* By the 3 Geo. 4, c. 46, s. 2, fines imposed at quarter sessions are to be inserted on the roll by the clerk of the peace, and a copy thereof, together with a writ of *distringas* and *capias*, is to be sent by him within twenty-one days to the sheriff, which is to be the sheriff's authority for levying such fines. By sect. 3, the clerk of the peace, before sending the roll to the sheriff, is to make oath that the roll is truly made up, and that the fines are, to the best of his knowledge, inserted therein, and that all fines paid to or received by him are inserted therein, without any wilful omission:—
Held, that on such roll and writ being sent to the sheriff, his duty is not merely ministerial; but that, if he has received the fine, he must not proceed to levy it, although it may appear upon the roll to be unpaid. *Wildes v. Morris*, 181.
2. *Fines.]* *Held*, also, that if the clerk of the peace has received the fine, he must enter it upon the roll as paid; and that if the sheriff has received it, and that fact is known to the clerk of the peace, he may enter it upon the roll as paid; but *quære*, in this latter case, if he is bound so to enter it? *Ib.*
3. By the 59 Geo. 3, c. 28, two courts may be held at quarter sessions, and the clerk of the peace is to appoint a fit and sufficient person to record the proceedings in the second court, and such proceedings are to be delivered over to the clerk of the peace, and to be equally deemed a part of the records as if recorded by the clerk of the peace himself, and the justices may make an order on the treasurer to pay to the clerk of the peace such sum as they shall deem a reasonable remuneration to the clerk for such purpose. *Ib.*
4. *Quære*, whether the person so appointed is the servant of the clerk of the peace, so as to render the latter liable for the negligence of the former, or so as to make a receipt by such person, of a fine imposed at quarter sessions, a receipt by the clerk of the peace? *Ib.*
5. *Quære*, also, if such person has authority to receive fines imposed at quarter sessions, so as thereby to charge the clerk of the peace with the receipt of them? *Ib.*
6. Where such person had received in court a fine so imposed, and had handed it over to the under-sheriff, but made no record of such payment, and the clerk of the peace not knowing that such payment had been made, inserted the fine on the roll as unpaid, and the sheriff thereupon levied the fine:—
Held, that the clerk of the peace was not bound to enter the fine as paid unless his appointee was his servant, acting within his authority. *Ib.*
7. *Held*, also, that the sheriff ought not to have levied the fine; and, per ERLE, J., that he was responsible to the party levied upon for having done so. *Ib.*

COLLATERAL ISSUE.

See WITNESS.

Common Law.

COMITY.

Of Nations.]

See STATUTE OF FRAUDS.

COMMON LAW PROCEDURE ACT.

See PRACTICE.

COMMON-CARRIERS.

1. *Loss by Robbers — Dangers of Road.]* The defendants received goods at Panama, to be carried to and delivered in London, "the act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers of whatever nature or kind soever excepted." The goods were stolen without violence, when in the course of transmission from Southampton to London : —

Held, that this was not a loss within the exception either of "robbers" or "dangers of the roads," as the word "robbers" meant loss by violence, and "dangers of the roads" meant either dangers of roads where ships lie at anchor, or such dangers on land as more immediately occur on roads, *e. g.* the overturning of the carriages. *De Rothschild v. The Royal Mail Steam Packet Company*, 327.

2. *Limitations of Liability — Negligence.]* The plaintiff being the owner of a horse delivered it to the defendants, a railway company, to be carried on their railway, subject to conditions which stated that the owners undertook all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage howsoever caused, occurring to live stock of any description travelling on the railway. The horse having been injured by the horsebox being propelled against some trucks through the gross negligence of the company : —

Held, contra dicente, PLATT, B., that the company, under the terms of the contract, were not responsible for the injury. *Carr v. The Lancashire and Yorkshire Railway Company*, 340.

3. *Theft.]* *Quære*, whether the company would have been responsible if the horse had been stolen. *Ib.*

4. *Liability of — Luggage.]* If a passenger on a railway carry merchandise packed up with his personal luggage, the railway company are not responsible for the value of the merchandise if the luggage be lost from the train. But if the merchandise be so packed as to be obviously merchandise to the eye, the railway company will be responsible for the loss in the absence of any bargain to the contrary. *The Great Northern Railway v. Shepherd*, 367.

5. *Limiting Responsibility — Pleading.* To an action on the case, in which the declaration stated that the defendants were common-carriers, and that they received from the plaintiff, as such common-carriers, a certain package, to be safely carried and to be delivered for him at a place mentioned, and that the defendants did not safely carry the package, but that through their negligence it was lost; the defendants pleaded that, at the time they received the package, they gave the plaintiff notice that they would not be responsible for packages of a particular description, under which this particular package fell, unless their contents were declared; and that the contents of this package were not declared; and that the defendants did not consent to be responsible contrary to the terms of such notice. Verification : —

Held, that the plea amounted to an argumentative denial of the bailment as alleged in the declaration. *Crouch v. The London and North-Western Railway Company*, 498.

See COUNTY COURT.

COMPOSITE SUBSTANCE.

See PATENT.

Common Law.

COMPOSITION.

Deed of.]

See BANKRUPT.

CONCURRENT REMEDIES.

See ACTION ON THE CASE.

CONDITION PRECEDENT.

1. *Revocation — Reference.]* The defendant by deed appointed the plaintiff auditor of his estates at a yearly salary, and in consideration thereof the plaintiff covenanted to give up his practice as a barrister, if required so to do, and not to accept any other office or employment whatever, so long as he should hold the said office. The defendant also covenanted to pay the plaintiff the said salary during so long as he should hold the office; and in case the defendant should revoke the appointment without adequate and just cause (to be determined as hereinafter mentioned), that the defendant should pay him a retiring pension of 1,000*l.* a year; and it was provided that the adequacy and justice of the cause of any revocation by the defendant of the said appointment should be determined by J. W.:—

Held, that the defendant had no power of dismissing the plaintiff without giving him a right to the pension of 1,000*l.* a year, until he, the defendant, had previously ascertained by a reference to J. W. that he had adequate and just cause to revoke the appointment. *Lowndes v. Earl of Stamford*, 23.

2. *Declaration.] Held*, also, that the jurisdiction of the court to enforce payment of the retiring pension was not ousted; and that the plaintiff might declare for it without showing that there had been any determination by J. W. or any excuse for his not having obtained such determination, or that a reasonable time for obtaining such determination had elapsed. *Id.*

See COVENANT.

CONDITIONAL CONTRACT.

See RAILWAYS.

CONDITIONAL SALE.

See STOPPAGE IN TRANSITU.

CONFLICT OF LAWS.

See STATUTE OF FRAUDS.

CONSIDERATION.

Failure of.]

See ANNUITY.

CONSTABLE.

See OFFICER.

CONSTRUCTION.

Of Bill of Lading.]

See BILL OF LADING.

Of Covenant.]

See COVENANT.

Common Law.

CONTINGENT DEBT.

See BANKRUPT.

CONTINGENT LIABILITY.

See BANKRUPT.

CONTRACT.

1. *Entire Apportionment.*] Where the plaintiff was by deed appointed to "the offices of auditor and superintending manager of the defendant's estates" at a salary of 1,800*l.*, payable half-yearly on the 7th of July and the 7th of January in every year, and the defendant had revoked the appointment in the middle of a current year:—

Held, that the 4 & 5 Will. 4, c. 22, s. 2, did not enable the plaintiff to recover a proportionate part of the salary in respect of that portion of the year during which the plaintiff held the offices. *Loundes v. Earl of Stamford*, 23.

2. *Stat. 4 & 5 Will. 4, c. 22.*] That statute applies to cases where payment for the whole period must be made to some person, and does not include a payment under a contract between employer and employed for services performed, where the payment entirely ceases upon the determination of the claimant's right to receive it. *Ib.*

3. *On behalf of a Company.*] By a deed made between L. and his wife of the first part; the defendant of the second; the plaintiffs, a joint-stock company, of the third, and the trustees of the company of the fourth, in consideration of 200*l.* advanced to L. by the company on the execution, L. and the defendant covenanted to pay an annuity to the plaintiffs, and that L. should keep on foot a policy on his own life, and one upon his wife's. L. and his wife further granted to the trustees their interest in certain freehold property, upon trust to pay thereout, by sale or otherwise, the arrears of the annuity, and pay over the surplus moneys received to the parties entitled thereto. In an action of covenant by the company against the defendant for the non-payment of the annuity, and for not keeping on foot the policies, the defendant, after setting out the deed on oyer, pleaded that it was a contract made on behalf of a completely registered joint-stock company, under the 7 & 8 Vict. c. 110, s. 44, and that it was void because it was not executed with the formalities thereby required:—

Held, that the plea was bad, the contract not being one made on behalf of the company, and being a unilateral one, on which the covenantee might sue without executing it. *British Empire Mutual Life Assurance Co. v. Browne*, 285.

4. *Not Void made with a Director.*] The 85th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, enacts, that "no person interested in any contract with the company shall be capable of being a director, and no director shall be capable of being interested in any contract with the company during the time he shall be a director." The 86th section enacts, that "if any director, at any time subsequent to his election, be either directly or indirectly concerned in any contract with the company, then the office of such director shall become vacant, and he shall cease from voting or acting as a director:—"

Held, that if a contract be entered into by a director with the company after his election, it is not rendered void, but the office only of a director is vacated. *Foster v. The Oxford, Worcester and Wolverhampton Railway Co.*, 306.

5. *Pleading.*] Covenant by three plaintiffs against an incorporated company for not accepting goods according to a mutual agreement under seal. Plea, that at the time of making the agreement one of the plaintiffs was a director of the company:—

Held, bad on general demurrer. *Ib.*

6. *Construction.*] The construction of a written contract, the parties never having had any personal communication with each other, and there being no usage concerning it, is entirely for the judge. *Key v. Cotesworth*, 435.

Common Law.

7.. *Condition — Construction.*] In an action by an engineer against a provisional committee-man of a railway company, it appeared that, at a meeting of the committee, at which the plaintiff was present, it was resolved, "that the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the company, and that no such responsibility shall attach to them." At another meeting, at which the plaintiff was also present, a resolution was passed, which contained a statement that the plaintiff had said "that he would make no claim for his services until there should be sufficient funds of the company to meet any demand he might be entitled to make." The plaintiff stated in a letter, that "he never understood that, unless the project were successful, the engineers were to abandon all claim; but he did understand, that the individuals comprising the committee were not to be held personally liable." At a subsequent meeting of the committee, it was resolved, "that the committee bind themselves to be answerable to the extent of 1,000*l.*, to be applied to engineering and surveying purposes." The scheme was abandoned, and deposits to the amount of 4,168*l.*, which had been received by the committee, were returned to the shareholders: —

Held, that the defendant was not responsible, the contract being that the plaintiff should be paid out of such funds as could be properly applied in satisfaction of his claim, and there were no funds of that description. *Landman v. Entwistle*, 491.

When Implied.]

See RAILWAYS.

Rescission of.]

See ACCORD AND SATISFACTION. JOINT-STOCK COMPANY.

CONTRADICTION.

Of Witness on Immaterial Issue.]

See WITNESS.

CONTRIBUTION.

Liability of Shareholder for.]

See JOINT-STOCK COMPANY.

CONVERSION.

See BANKRUPTCY. TROVER.

CORPORATION.

Contract with.]

See CONTRACT.

Liability on Implied Contract.]

See RAILWAYS.

Liability of Shareholders in.]

See JOINT-STOCK COMPANY.

Liability of.]

See RAILWAYS.

CORRUPTION.

Necessary to Ground a Criminal Information upon.]

See CRIMINAL INFORMATION.

COSTS.

1. *To Prosecutor under 5 & 6 Will. & M. c. 11.*] Where a defendant was convicted on an indictment for perjury, in an affidavit, removed by himself by *certiorari* into the

Common Law.

- Court of Queen's Bench, the prosecutors were held entitled to costs under the statute 5 & 6 Will. & M. c. 11, as "parties aggrieved or injured," although the false swearing failed of its effect and the prosecutors were only interested as executors in the suit in which the false affidavit was made. *Regina v. Major*, 144.
2. *Security, when Required.*] Security for costs will not be required from a plaintiff who is a foreigner, if he is actually in this country. *Tambisco v. Pacifico*, 332.
 3. *Oliva v. Johnson*, 5 B. & Ald. 908, overruled. *Ib.*
 4. *Notice of Taxation.*] Where judgment has been signed costs taxed, and execution issued for the amount of debt and costs without notice of taxation, the court will not set aside the judgment or execution, but will direct a review of the taxation. *Field v. Partridge*, 356.
 5. *County Court—Jurisdiction.*] Where one of several plaintiffs dwells beyond twenty miles from the defendant, the superior courts have concurrent jurisdiction with the county court, under the 9 & 10 Vict. c. 95, s. 128, and the plaintiffs will be, therefore, entitled to costs, under the 13 & 14 Vict. c. 61, notwithstanding less than 20*l.* is recovered. *Hickie v. Salomo*, 358.
 6. *Judge's Order.*] On the 19th of March, previously to the Surrey spring assizes, the defendants obtained a judge's order, in substance as follows:—That the plaintiff should show the defendants certain letters within ten days, and that the defendants should be at liberty to take copies; that if the plaintiff should not be able to produce the letters he should make an affidavit to that effect within ten days, and that in default thereof all further proceedings be stayed till payment; that the venue be, changed to Middlesex, on payment of costs, become fruitless by such change of venue; and that the time for inspection under the order of the 13th of March be also enlarged for ten days. The venue not having been changed by the defendants, was afterwards changed by the plaintiff:—
Held, that the defendants were liable to pay the costs, which had become fruitless by the change of venue, the words, "upon payment of costs," being under the circumstances of the case, words of agreement and not words of condition. *Horton v. The Westminster Improvement Commissioners*, 401.
 7. *Certificate of Judge.*] Under the 12th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, a judge has power to certify for costs, where the sum recovered in actions of contract is 20*l.* and in tort 5*l.* *Garby v. Harris*, 479.
- See *Bannatyne v. Bannatyne*, 595. *Fuller v. Earle*, 390. *Geils v. Geils*, 1. *Grinham v. Card*, 396. *Regina v. Salford*, 147. *Regina v. Street*, 172. *Wildes v. Morris*, 181.

COUNTERFEITING.

See FORGERY.

COUNTY.

Liability for repair of Bridges.]

See BRIDGES.

COUNTY CONSTABLE.

See TRESPASS.

COUNTY COURT.

1. *Jurisdiction—Contract with Carrier.*] A carrier and wharfinger, residing at Swindon, in Wiltshire, agreed in writing with M., who resided in Surrey, to barge timber

Common Law.

from Swindon Wharf to London, at any wharf there, at 16s. per ton, to include all charges except wharfrage. It was necessary to haul the timber from the place where it lay to be loaded on board the barges, and at times when the horses of M. were not on the spot, the carrier provided horses, and hauled the timber. A plaint was afterwards brought in the county court for the district of Swindon against M. for 50l., the balance of account claimed by the carrier, including two items, amounting to 1l. 16s., for hauling:—

Held, that the hauling of the timber and the carriage of it to London constituted but one cause of action; and, that as such cause of action did not arise until the delivery of the timber in London, the judge of the Swindon county court had no jurisdiction to try the plaint under the 9 & 10 Vict. c. 95, s. 60. *Barnes v. Marshall*, 45.

2. *Jurisdiction*—*Stat. 1 Vict. c. 33.*] Sect. 18 of stat. 1 Vict. c. 33, (local and personal, public,) authorized commissioners to pave the streets of B., and enacted that the expenses thereof should be sued for “in any of her majesty’s courts of record at Westminster:—

Held, that by virtue of sect. 58 of stat. 9 & 10 Vict. c. 95, the county court had jurisdiction over a suit founded on sect. 18 of stat. 1 Vict. c. 33. *Stewart v. Jones*, 163.

3. *Jurisdiction*—*Devastavit.*] In an action in the county court to recover a legacy, under the 9 & 10 Vict. c. 95, s. 65, as extended by the 13 & 14 Vict. c. 61, s. 1, the judge has jurisdiction to try a question of *devastavit*. *Winch v. Winch*, 292.

Jurisdiction of.]

See CRIMINAL INFORMATION. FRIENDLY SOCIETIES ACT.

COURT.

When to Construe a Contract.]

See CONTRACT.

COUNTY VOTE.

See ELECTIONS.

COVENANT.

1. *When Implied.*] An indenture between the plaintiffs below and the defendants below, (a railway company,) after reciting that the defendants were desirous of being supplied with 350,000 railway sleepers, and that the plaintiffs were willing to supply them according to the terms of a specification and tender, contained a covenant by the plaintiffs that they would supply the sleepers within the time specified, “as, and when, and in such quantities, and in such manner,” as the engineer of the company, by order in writing, “from time to time, or at any time within the period limited by the specification, should require.” The specification stated that the number of sleepers required was 350,000; that one half would have to be delivered in 1847, and the remainder by midsummer, 1848. The deed also contained provisos that the engineer might vary the times of delivery; that the company should retain 2,000l. in their hands as security for the performance of the contract, and should pay it over within two months after all the sleepers had been delivered; and that the contract might be put an end to upon default made by the plaintiffs, or upon their bankruptcy or insolvency:—

Held, First, that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers. *The Great Northern Railway Co. v. Harrison*, 189.

2. *Condition Precedent.*] Secondly, that an order by the engineer was a condition precedent to any delivery of the sleepers by the plaintiffs. *Ib.*

3. Thirdly, that the company were bound to cause such order to be given within the time limited by the specification. *Ib.*

Common Law.

4. Fourthly, that although the engineer had power to alter the time for the delivery of the sleepers, such power was to be exercised within the period limited by the specification. *Ib.*
5. Fifthly, that the engineer, as to matters in which he had a discretion, *e. g.* as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties, but as to giving the order for the delivery he was a mere agent of the company. *Ib.*
6. *Construction.*] The only legitimate rule of construction is to ascertain the meaning from the language used in the instrument coupled with such facts as are admissible in evidence to aid its explanation. — Per PARKE, B. *Ib.*
- *7. *Pleading.*] In an action upon the above deed, on the ground that the company had not given any order for the delivery of sleepers within the specified period:—
Held, that it was unnecessary to aver readiness and willingness to deliver them, as the plaintiffs were not bound to be ready and willing until the order was given. *Ib.*

When a Concurrent Remedy with Case.]

See ACTION ON THE CASE. CONTRACT.

Not to Sue.]

See PAYMENT. PRINCIPAL AND SURETY. RAILWAYS.

CRIMINAL INFORMATION.

Corrupt Notice.] A summons was issued against a judgment debtor, under the 98th section of the 9 & 10 Vict. c. 95, in the usual form, calling upon him to appear, and to be examined by the judge of the court touching his estate and effects, and the manner and circumstances under which he contracted the debt which was the subject of the action in which the judgment was obtained, and as to the means and expectation he then had, and as to the property and means he still had, of discharging the debt, and as to the disposal he might have made of any property, &c. The defendant appeared, and was duly sworn. The judge asked him whether he was prepared to pay; he answered in the negative, and was entering into an explanation of the circumstances, when he was stopped by the judge, who ordered his immediate committal to prison:—

Held, that these circumstances afforded no ground for a criminal information, there being no imputation of a corrupt motive on the part of the judge. *In re* —, 151.

CROSS EXAMINATION.

Of Witness.]

See WITNESS.

DAMAGES.

When Nominal.]

See TRESPASS.

DANGERS OF ROADS.

Meaning of in a Bill of Lading.]

See BILL OF LADING.

DEBT.

Distinction from Liability.]

See BANKRUPT. PAYMENT.

Against a Corporation.]

See RAILWAYS.

Common Law.

DEED.

Construction of—Power to make Sluice.] Trespass for breaking and entering plaintiff's close, and cutting down the sides of a sluice or goit there, and widening the same. Plea, justifying the trespass under a deed, dated the 12th July, 1800, by which plaintiff demised land to W. S. and G. S., (under whom the defendant claimed,) for 999 years, and by which power was given to W. S. and G. S. to cut a goit or sluice through plaintiff's close in a certain direction, and also power from time to time during the term to repair and amend the said goit or sluice, making reasonable satisfaction to plaintiff for damage done thereby to the grass of plaintiff; provided that, for the term of two years from the commencement of the rent, no trespass or damage should be charged or paid for. Replication, that before the expiration of two years from the commencement of the rent, and during the said term, W. S. and G. S., in the due exercise of the said power, cut, made, and completed a certain goit or sluice in such direction as in the indenture mentioned, and through the close in the indenture, and in the plea mentioned, being the same goit or sluice in the declaration and in the plea in that behalf mentioned, which said goit, when so cut, made, and completed, was of the width in the plea in that behalf mentioned; and that the said goit or sluice, being so then cut, made, and completed, and then being of the width aforesaid, remained and continued of the width aforesaid, and in that state and condition was used and enjoyed until defendant, under color of the said indenture, and in pretended further exercise of the said power, broke and entered the close of plaintiff:—

Held, upon demurrer, (by the Queen's Bench and Exchequer Chamber,) that the power given in the deed to make a goit or sluice, having been once exercised, was exhausted, and therefore the replication was good. *Bostock v. Sidebottom*, 152.

See CONTRACT. STATUTE OF FRAUDS.

DELAY.

See PRACTICE.

DELIVERY.

Of Property Sold.]

See STOPPAGE IN TRANSITU.

DEMAND.

Evidence of Conversion.]

See TROVER.

DEMURRER.

See PLEADING. PRACTICE.

DETINUE.

Pleadings in.]

See PLEADINGS.

DEVASTAVIT.

May be Tried in County Court.]

See COUNTY COURT.

Common Law.

DEVIATION.

See RAILWAYS.

DEVISE.

See WILL.

DILATORY PLEA.

See PLEADING.

DIRECTORS.

Contract with.]

See CONTRACT.

Of Railways — Powers of.]

See RAILWAYS.

DISCRETION.

See PROCEDENDO.

DISCHARGE.

See ACCORD AND SATISFACTION. BANKRUPTCY. PAYMENT.

DISTRESS.

1. *Payment of Rent.]* A tenant being indebted to his landlord for rent, the agent of the landlord, without his authority or knowledge, took a bill of exchange from the tenant for the amount of the rent, and paid over the amount of the rent to the landlord in his settlement of account. The bill was afterwards dishonored whilst in the hands of a third party, and the rent was not paid by the tenant, whereupon the landlord distrained :—

Held, to be a question for the jury, whether the bill was discounted for, or the money lent to the tenant by the agent, or whether it was an advance by the agent to the landlord; and that if the bill was discounted for, or the money so lent to the tenant, the landlord was not entitled to distrain; otherwise he was entitled. *Parrott v. Anderson*, 371.

2. *Payment by Agent.]* So in another case where, on the rent becoming due, the agent for both tenant and landlord paid the amount of rent to the landlord without any authority from either party, and the tenant afterwards failed to pay the rent, and the landlord distrained. *Griffiths v. Chichester*, 372.

3. *Right to — Interest in Premises.]* Trespass to goods. Plea, that by an indenture, made in 1847, between Q. and the defendant, it was agreed between Q. and the defendant, who was, during all the time thereafter mentioned, possessed of certain premises for a certain term then to come and unexpired therein, that Q. should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.*, for which rent it should be lawful for the defendant to distrain as landlords may for rents reserved on leases for years; that Q. held the premises under the said indenture and agreement; that three years' and a quarter's arrears of rent became due, during the time Q. held the premises as such tenant, and the defendant was possessed of them as aforesaid; and that the defendant distrained the goods for rent. The plaintiff set out the indenture on oyer, from which it appeared that Q., having become, in 1847, the lessee of the premises, under M. for twenty-one years, wanting one day,

and having borrowed money from the defendant, demised the premises to the defendant by way of mortgage, at a peppercorn rent, and that the defendant re-demised the same to Q. at a yearly rent of 150*l.*, with power of distress:—

Held, on demurrer, that the plea was bad in not showing such an interest in the premises, on the part of the defendant, as entitled him to distrain. *Pinhorn v. Sonster*, 454.

4. *For Rent — Pleading.*] To a declaration in trespass, for breaking and entering a close of the plaintiff, called the stable, and breaking the doors thereof, and for seizing and carrying away divers goods and chattels of the plaintiff therein, the defendant pleaded, under the 11 Geo. 2, c. 19, s. 1, that at the time when the trespasses were committed, one O. O. was tenant of certain premises to the defendant at a certain rent, and that half a year's rent was then due to the defendant from the said O. O., and in arrear and unpaid; and that, within thirty days before the said time when, &c., O. O. fraudulently and clandestinely conveyed from the premises held by him as such tenant, the goods and chattels in the declaration mentioned, being the proper goods and chattels of the said O. O., in order to prevent the defendant from distraining them for the rent in arrear; and that, because the said goods and chattels so fraudulently and clandestinely conveyed by O. O. still remained in the said close in which, &c., and were there locked up, to prevent them from being seized as a distress for the said arrears of rent, the defendant, whilst the rent remained due, and within thirty days after the said goods and chattels had so been clandestinely and fraudulently conveyed and locked up, entered the said close, in order to seize and take the said goods and chattels as a distress for the said arrears of rent so due, and did at the time when, &c., and within thirty days after the said goods and chattels had been so conveyed as aforesaid, seize them as a distress for the said arrears of rent; and that, because on that occasion the said goods and chattels were put and kept in the close locked up, so as to prevent them from being seized as a distress for the said arrears of rent, and so that the defendant could not, without breaking open and entering the said close seize the said goods, the defendant was obliged and did in order to seize the said goods, first calling to his assistance the constable of the place where the said close and goods were, according to the form of the statute, and with his aid and assistance, in the day time break open and enter the said close, in order to seize the said good and chattels for the said arrears of rent, according to the statute; and that the defendant in so doing did no unnecessary damage, &c.:—

Held, first, that although it was stated in the plea that the goods were the tenant's at the time of the removal, it admitted them to be the plaintiff's at the time of the seizure, as averred in the declaration, and therefore, that the plea was not objectionable in form, as amounting to an argumentative traverse, that at the time of the trespass they were the goods of the plaintiff. *Williams v. Roberts*, 482.

5. *Held*, secondly, that the plea afforded a good *prima facie* defence to the action within the 11 Geo. 2, c. 19, s. 1. It is unnecessary, in a plea framed under this statute, to show that the goods have not been made the subject of a *bona fide* sale to persons not privy to the fraudulent removal, as provided by the 2d section; that fact must be replied. *Ib.*

6. It is also unnecessary to state in the plea, that the party upon whose land the goods are seized is privy to the fraud; and a previous request is unnecessary, in order to give the landlord the right to break into the premises for the purpose of seizing the goods. *Ib.*

7. *Pleading.*] To an action of trespass for breaking and entering the plaintiff's house and seizing his goods, the defendant pleaded that one Thomas held a house as tenant to one Payne, at a certain rent; that the rent was in arrear; that the said goods, being the goods of Thomas, were fraudulently and clandestinely conveyed by him from his house to prevent a distress, and were, with the plaintiff's consent, placed in the plaintiff's house; whereupon the defendant, as bailiff of Payne, and by his command, seized the goods as a distress.

Replication, that the said goods were not the goods of Thomas, nor were they fraudulently and clandestinely conveyed away by Thomas to prevent a distress. *Semble*, that the replication was not open to the objection of multifariousness, but that it was a good answer to the plea. *Thomas v. Watkins*, 489.

Common Law.

See LANDLORD AND TENANT. REPLEVIN.

DISTRINGAS.

See SHERIFF.

DISSOLUTION.

Of a Company—no bar to an Action.]

See RAILWAYS.

DIVORCE.

See PLEADING.

DOCUMENTS.

Inspection of.]

See INSPECTION OF DOCUMENTS.

DOMICIL.

See PLEADING.

DOWER.

See LEGACY DOWER.

EJECTMENT.

1. *Amendment.]* The declaration in ejectment stated a joint demise by H. and M., his wife. Proof that H. was devisee in trust for the sole use of M. :—
Held, that the judge had no power under the 3 & 4 Will. 4, c. 42, s. 23, to amend the record by striking out the name of M. in the demise. *Wilton v. Beck*, 255.
1. *Variance.] Semble*, (per MAULE, J.) That the variance was in a particular material to the merits. *Ib*.

ELECTION.

Of Remedies.]

See ACTION ON THE CASE.

1. *Signature by Initials.]* Where at an election of councillors for a borough, the voting paper is signed with the surname and the initial of the christian name of the burgess voting, it is a sufficient compliance with section 32 of the 5 & 6 Will. 4, c. 76. *Regina v. Avery*, 86.
2. *Description of Qualification.]* The voting paper described the property in respect of which a burgess voted, as "Pilton Street." He was described in the burgess roll as "of Pilton," and his qualifying property "House, in the Street." It appeared in evidence that Pilton consisted of only one main street, which was called "Pilton Street," or "the Street," indiscriminately :—
Held, that the voting paper was sufficient. *Ib*.
3. *Voters — Objections — 6 & 7 Vict. c. 18.]* The respondent, claiming a vote for the city of C., received a notice of objection from the appellant, who described himself therein as "on the list of freemen for the city of C." It appeared that besides the list of freemen for the city entitled to vote for members of parliament, there was a list called the Freemen's Roll, kept for municipal purposes :—

Held, that the revising barrister was right in deciding that the notice was sufficient, under the 17th section of the 6 & 7 Vict. c. 18, as affirming that the objector was on the list of freemen entitled to vote. *Dissentiente*, MAULE, J. *Feddon v. Sayers*, 256.

4. *County Vote — 40s. Freehold.*] The appellant claimed, with twenty-nine other persons, to vote in respect of certain freehold premises which were let at a gross rent. During the six preceeding years the landlords had voluntarily paid for repairs:—
Held, that the question whether the annual value of the freehold was reduced by such payments below 60*l.*, depended upon the rent which could be obtained if the tenant had to keep the premises in repair; and that the revising barrister, having found that the rent which could be obtained in that case would be less than 60*l.*, the several persons in whom the freehold was vested were not entitled to vote. *Hamilton v. Bass*, 264.

5. *Form of Notice of Objection.*] The 7th section of 6 Vict. c. 18, requires that a notice in the form set out in schedule A. annexed thereto, or to the like effect, should be served upon the person whose vote is intended to be objected to:—

Held, that a notice in the following terms, "Take notice, that I object to your name being retained on the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts," was sufficient notice to a person that his vote for the county would be objected to. *Lambert v. Overseers of St. Thomas*, 267.

6. 8 & 9 Vict. c. 6.] The 8 & 9 Vict. c. 6, an Allotment Act, empowers deputies appointed under its provisions to make small allotments of land to resident freemen of L., to be held by them so long as they shall be willing to hold the same, and pay the rent, and conform to certain regulations. All the land is vested in the deputies as trustees; and they have the power to sell with the concurrence of a majority of a meeting of freemen occupiers:—

Held, that the allottees have freehold estates which entitle them to vote for members of parliament, as their estate may continue for life, and is not determinable on the mere will of the grantors. *Beeson v. Burton*, 276.

7. *Vote for Borough.*] By 11 & 12 Vict. c. 90, no person is entitled to be registered as a voter, unless, on or before the 20th July, he shall have paid all assessed taxes which have become payable by him previous to the 5th January preceding. By the 43 Geo. 3, c. 161, s. 23, the assessed taxes are payable, and are to be paid quarterly on the 20th of July, the 20th of September, the 20th of December, and the 20th of March. By the 48 Geo. 3, c. 141, s. 1, the collectors are directed to collect the assessed taxes, in equal moieties, within twenty-one days after the 10th of October and the 5th of April; but with a proviso that nothing therein contained shall be construed to alter the time when the duties are made payable by the previous act. The quarter's house tax due from the appellant on the 20th of December was not demanded till the 11th of April following, and he did not pay it before the 20th of July:—

Held, that the quarter's assessed taxes, which, by the 43 Geo. 3, c. 161, s. 23, became payable on the 20th of December, are taxes which, in the language of the 11 & 12 Vict. c. 90, have become payable before the succeeding 5th of January, although no demand for payment had been previously made; and that, therefore, the appellant was not entitled to be placed on the register. *Ford v. Smedley*, 280.

8. *Parliament — Borough Franchise.*] The appellant claimed to vote in respect of the occupation of premises described as a "house and garden," and held under the same landlord, at one entire rent. The house alone would not let for 10*l.*, and the garden was separated from it by waste land and a row of buildings:—

Held, that the word "therewith," in the 27th section of the Reform Act had reference to time and not to locality, and that, therefore, the circumstance of the garden being separate from the house did not invalidate the qualification, as the house alone would not have let for 10*l.* *Collins v. Thomas*, 284.

9. *Mortgage — County Registration.*] Mortgage interest may be apportioned for the purpose of ascertaining whether the freehold is of the annual value of 40*s.* above all charges; and, therefore, a freeholder is entitled to be registered as a voter for the county in respect of freehold land in the county of the annual value of 5*l.* although such land is, with other land, of the annual value of 60*l.*, subject to a mortgage for

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300*l.*, the interest of which is 15*l.* a year. *Moore v. The Overseers of Carisbrooke*, 295.

10. *County Vote — Rent Charge.*] The owner of freehold land, on which was a rent-charge granted a part of it in fee, subject to a certain proportion of the rent-charge. The conveyance contained covenants by the grantor to pay, and to indemnify the grantee against the remainder; there was also a power of distress to the grantee over the residue of the land in case he were compelled to pay more than his proportion. The rent-charge was thus fairly apportioned, and the residue of the land was sufficient to meet its proportion:—

Held, that in estimating the value of the grantee's land with reference to the county franchise, the apportioned part only of the rent-charge was to be deducted from the annual value; for that the "charges" to be deducted, under the 8 Hen. 6, c. 7, and the subsequent statutes, were such as were ultimately payable out of the land, and not what were primarily charged upon it. *Barrow v. Buckmaster*, 299.

11. *Semble*, that in the absence of the covenant of indemnity and power of distress, the same deduction only would be made, the rent-charge being apportionable, at least in Equity. *Ib.*

12. *Burgess — Paying Scot and Lot.*] A, a freeman of the borough of Shrewsbury paying scot and lot, for upwards of two years last past, and down to the 25th of March, 1851, occupied and resided in a house on the Wyle Cop, within the ancient and present limits of the borough, and, since the 25th of March, down to and on the 31st of July, occupied and resided in a house at Coton Hill, without the ancient but within the present limits of the borough. The revising barrister holding him to be disqualified by the 2 Will. 4, c. 45, s. 32, expunged his name from the list of free-men voters:—

The court, without hearing any argument (the counsel for the respondent admitting that he could not support it,) reversed the decision. *Jarvis v. Peele*, 323.

ENGINEER.

Duty of.]

See RAILWAYS.

Contract to pay.]

See RAILWAYS.

EQUITY.

Relief in.]

See JOINT-STOCK COMPANY.

See FRIENDLY SOCIETIES ACT.

ESTATE.

Meaning of the Word.]

See WILL.

ESTOPPEL.

See FRAUD.

ESTREAT.

See RECOGNIZANCE.

EVIDENCE.

1. *Of Acceptance of Bill of Exchange.*] The bare production of a bill of exchange, with formal proof of the writing to the acceptance, is *prima facie* evidence

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that the bill was accepted during its currency, and within a reasonable time of the date it bears, such being the regular and usual course of business. What is a reasonable time depends on the relative places of abode of the parties to the bill. *Roberts v. Bethell*, 218.

2. *Trespass — Duration of Tenancy.*] In an action of trespass, where the plaintiff proves by parol that he occupies the premises under a written agreement from W., and the defendant produces a lease from W., made and taking effect about the time of the acts complained of as trespasses; in order to entitle him to more than nominal damages, the plaintiff must show the duration of his interest, which he can only do by the written instrument. *Twyman v. Knowles*, 318.
3. *Contradicting a Witness.*] The defendant being sued as executor of A, in respect of a promissory note, purporting to be signed by A and B, but alleged by the defendant to be forged, stated, in cross-examination, that he had not heard B admit having signed the note :—
Held, that the plaintiff was not at liberty to contradict the defendant by showing that the latter had heard B make the admission. *Palmer v. Trower*, 470.
4. *Stamp — Fraud — Trotting Match.*] On the trial of an action against the stakeholder to a trotting match, by the party whose horse was defeated, to recover back his stake, the plaintiff first put his case on the ground that the race was an illegal one; and on this being overruled, set up that he had been induced by fraud to enter into the match, the horse which ran against his having been a different horse from the one he purported to be, and disguised by paint to represent him :—
Held, that in order to prove this fraud, the articles of agreement for the match were receivable in evidence without a stamp. *Holmes v. Sizsmith*, 517.

Of Marriage.]

See MARRIAGE.

Of Infringement.]

See PATENT.

Of Infancy.]

See INFANCY.

See TRESPASS. WILL. WITNESS.

EXAMINATION.

Of Witness.]

See WITNESS.

EXECUTION.

See COSTS.

Writ of.]

See JUDGMENT

EXECUTORS.

1. *Set-off.*] Where a defendant is sued as executor for a debt which accrued due from his testator during his lifetime, he may set off a debt which has accrued due from the plaintiff to him as executor since the death of his testator. *Wardall v. Thellusson*, 74.
2. Such debts are mutual, and due in the same right, within the meaning of the 2 Geo. 2, c. 22; the second clause of which, authorizing the set-off against an executor of debts due from the testator, does not limit the operation of the preceding clause. *Id.*

See ADMINISTRATION. BAIL.

EXECUTOR DE SON TORT.

What Constitutes.] A person receiving money from another, who is an executor *de son tort*, which he applies partly in payment of a debt due to himself from the deceased, and partly in payment of funeral expenses, returning a small balance in his hands, is not an executor *de son tort*; but it may be evidence thereof in connection with other facts. *Lysley v. Clarke*, 510.

FALSE PRETENCES.

See CENTRAL CRIMINAL COURT.

FALSE IMPRISONMENT.

See TRESPASS.

FEE SIMPLE.

What will Create.]

See WILL.

FEEES.

See SHERIFF.

FELONY.

Forfeiture on Conviction.]

See LARCENY. LEGACY.

FIAT.

Issue of Fiat in Bankruptcy not Notice.]

See BANKRUPT.

FINES.

Levying of.]

See SHERIFF.

FOOT-BRIDGE.

See BRIDGE.

FOREIGN LAWS.

Evidence of.]

See MARRIAGE. STATUTE OF FRAUDS.

FOREIGN ATTACHMENT.

See BAIL.

FORFEITURE.

See LEGACY.

Of Shares — By a Shareholder.]

See JOINT-STOCK COMPANY.

FORGERY.

Receipt — Uttering.] Where the prisoner placed a forged receipt for poor rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person : —

Held, that this was an uttering within 1. Will. 4, c. 66, s. 10. *Regina v. Ion*, 556.

FORMER JUDGMENT.

See PLEADING.

FRAUD.

1. *On Third Parties.]* The Westminster Improvement Commissioners were authorized by several acts of parliament to borrow such sums of money as they should think necessary for the purposes of the act, and to give bonds for the same, and which bonds were assignable. In an action by the plaintiff, as transferee of one of such bonds, the condition of which recited that the defendants had, in pursuance of the said acts, borrowed of one T. P. 5,000*l.*, for enabling them to carry the said acts into execution, the defendants pleaded that they did not borrow the said sum of the said T. P., or any part thereof, for the purposes of the said acts, and that they were not authorized to make the said bond, and that the same was made contrary to the provisions of the said acts, of which the said T. P. and the plaintiff had notice at the time the bond was made and transferred to the plaintiff : —

Held, upon general demurrer the plea was bad. *Horton v. The Westminster Improvement Commissioners*, 378.

2. The defendants also pleaded, that at and before the bond was made, certain persons, namely, C. M. and W. M., were entitled to receive from the defendants, certain bonds; that the said T. P. and others conspired fraudulently to procure for T. P. one of the said bonds to which the said C. M. and W. M. were entitled, and that by means of such conspiracy and fraud they procured the said C. M. and W. M., to authorize the defendants to give to the said T. P. one of the said bonds they were so entitled to; and that the bond sued upon was thereupon given to T. P. by the defendants, and that they the defendants had never borrowed any sum of money from the said T. P., of all which premises the plaintiff at the time of the transfer to him of the said bond had notice : —

Held, bad on general demurrer, because the defendants could not set up as a defence the fraud that had been committed upon C. M. and W. M., by whose directions they had, in pursuance of their contract with them, given the bond to T. P. *Id.*

See EVIDENCE. INSURANCE. INSOLVENT. SALE.

FRAUDS, STATUTE OF.

1. *Sect. 4.]* The 4th section of the Statute of Frauds does not make the agreements therein mentioned void, but only prevents their being enforced by action, if the requirements of that section are not complied with. *Leroux v. Brown*, 247.

2. *Contracts not to be performed in a Year.]* Therefore, an action cannot be maintained in this country upon a parol agreement, which is not to be performed within a year, although made in France, and valid and enforceable there. *Id.*

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3. *Guaranty—Correcting Mistake.*] A. having agreed to sell to B. two parcels of goods, before they were delivered, B. procured from C. a letter as follows:—"Upon your handing me your two drafts upon B. respectively for 200*l.* and 146*l.* at two months from this date, I undertake to get them accepted by B., and to see them paid." This was signed by C. The goods were then delivered, but B. a few days afterwards discovered that the goods charged 146*l.* should have been charged 150*l.*, and drew two bills accordingly for 200*l.* and 150*l.* respectively, which C. procured B. to accept, and C. then wrote across the guaranty the following words:—"I have received the two drafts, one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.* both accepted by B." Under this the plaintiff signed his own name:—

Held, that this was rightly described as an undertaking by C. to see the two bills of 200*l.* and 150*l.* respectively paid by B., and that it was sufficiently signed within the Statute of Frauds. *Bluck v. Gompertz*, 345.

4. *Interest in Lands.*] In an action to recover the expenses incurred by the plaintiff in investigating the defendant's title to mortgage certain lands, upon the ground that the defendant's title had turned out to be defective, the declaration stated, that, in consideration the plaintiff would advance 2,000*l.* upon the security of a mortgage of the land, upon the defendant's making out a good title to mortgage the said lands to the plaintiff, the defendant promised the plaintiff to pay him the expenses to which he might be subjected in case the loan should go off by reason of the defendant changing his views or of the defectiveness of the defendant's title. The evidence of the defendant's title was as follows:—The defendant, shortly before the agreement with the plaintiff, had contracted to purchase the premises of one W. E., who claimed as heir at law *ex parte maternâ* to one B. H., the person last seized. J. H., the father of B. H., married E. E., and died in 1787, aged 59, and devised the property to his son B. H. and his two daughters, and after their death, to B. H. in fee. The daughters both died unmarried, before B. H., who died a bachelor, in 1839. In order to negative the existence of any heirs *ex parte paternâ*, depositions in a chancery suit of *E. v. E.* in 1843, had been forwarded to the plaintiff, in which the deponents stated that they were well acquainted with B. H., who had told them that "he had no relation left." And the deponents stated, that they believed B. H. had no relation left, on his father's side, living at the time of his death. It further appeared that two issues had been directed in the same suit, in which both parties claimed the property as heir to B. H., *ex parte maternâ*, and that the jury had found upon two occasions (the cause having been tried twice,) first, that B. H. did not leave any heir *ex parte paternâ*; and, secondly, that the plaintiff in that suit (W. E. from whom the defendant claimed) was the heir at law of B. H. *ex parte maternâ*. A statutory declaration had also been furnished to the plaintiff, in which the declarant stated, that B. H. and his sisters had told him, on several occasions, that they had no relations whatever on their father's side, and that they had often heard their father declare that he had no relations whatever, but that he was the last of his family:—

Held, first, that the agreement between the plaintiff and the defendant was not within the 4th section of the Statute of Frauds. *Jeakes v. White*, 350.

5. And, secondly, per POLLOCK, C. B., ALDERSON, B., and PLATT, B., that the defendant had not made out a good title to the land; for that by "a good title" was to be understood such a title as the Court of Chancery would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment by any claimant. *Ib.* MARTIN, B., held that it was sufficient to establish a legal title in point of fact. *Ib.*

FREIGHT.

Action for.]

See SHIPS AND SHIPPING.

FRIENDLY SOCIETIES ACT.

County Court—Jurisdiction—Arbitration.] By the 32d rule of a friendly society established in 1836, it was provided that if any dispute should arise between any

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officers of the society, or between any other members and any officer, it should first be referred to the committee, and if their decision should not be satisfactory, then to arbitrators, pursuant to the 10 Geo. 4, c. 56, s. 27. In 1839, a reserved fund, consisting of subscriptions, was established, and was regulated by a new rule, called the 38th rule, which provided that every dispute should be referred to arbitration in the manner provided by the rule of the society. In 1850, this rule was expunged. The Friendly Societies Act, 13 & 14 Vict. c. 115, s. 22, enacts that if any dispute shall arise between the members or person claiming under or on account of any member of any society established under this act and the trustees, &c., or committee, it shall be settled as the rules of the society shall direct; but if the dispute be such that, for the settlement of it, recourse must be had to a court of equity, it may be referred to the judge of the county court. An action having been brought in the county court by the committee of the society against the trustees to recover the amount of the reserved fund:—

Held, that this was a dispute provided for by the 27th section of the 13 & 14 Vict. c. 115, and that it might be referred to arbitration under the 32d rule of the society; that it was not a dispute requiring to be settled by a court of equity; that the county court, therefore, had no jurisdiction, and a writ of prohibition ought to be awarded. *Grinham v. Card*, 396.

GENERAL HIRING.

When a Yearly Hiring.]

See TENANT.

GOIT.

See DEED.

GOVERNESS.

Not a Servant.]

See SERVANT.

GROSS NEGLIGENCE.

See COMMON-CARRIERS.

GROWING CROPS.

See SALE.

GUARANTY.

A. having agreed to sell B. two parcels of goods, before they were delivered, B. procured from C. a letter as follows:—“Upon your handing me your two drafts upon B. respectively for 200*l.* and 146*l.* at two months from this date, I undertake to get them accepted by B., and to see them paid.” This was signed by C. The goods were then delivered, but B., a few days afterwards discovered that the goods charged 146*l.* should have been charged 150*l.* and drew two bills accordingly for 200*l.* and 150*l.* respectively, which C. procured B. to accept, and C. then wrote across the guaranty the following words:—“I have received the two drafts, one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*, both accepted by B.” Under this the plaintiff signed his own name:—

Held, that this was rightly described as an undertaking by C. to see the two bills of 200*l.* and 150*l.* respectively paid by B., and that it was sufficiently signed within the Statute of Frauds. *Bluck v. Gompertz*, 345.

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See INSURANCE.

HIGHWAY RATES.

See RATES.

HOUSE OF LORDS.

Proceedings in.]

See APPEAL.

HOUSE-BREAKING.

See BURGLARY.

HUSBAND AND WIFE.

A wife can not be convicted of feloniously receiving from her husband goods stolen by him. *Regina v. Brooks*, 580.

See PLEADING.

IDEM SONANS.

See NAME.

IDIOCY.

See WILL.

ILLEGALITY.

Of Contract.]

See CONTRACT.

IMPLEMENTS.

Of House-Breaking.]

See BURGLARY.

IMPLIED COVENANT.

See COVENANT.

INDICTMENT.

Arrest of Judgment.] After a statute has been repealed it cannot be acted upon in respect of a proceeding under it, commenced before its repeal, and in this respect there is no valid distinction between matters of form and substance. Where, therefore, between the finding of an indictment for non-repair of a road and plea pleaded, the statute upon which alone the indictment could be supported, was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the court arrested the judgment. *Regina v. The Inhabitants of Denton*, 124.

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Misdescription.]

See BURGLARY.

Removal of to C. C. Court.]

See CENTRAL CRIMINAL COURT.

Removal of.]

See RECOGNIZANCE.

INFANCY.

Evidence of.] Action by indorsee against acceptor of a bill at four months' date. Pleas, that the defendant did not accept, and that he was an infant when he accepted. Proof, that the acceptance to the bill was the defendant's writing, that he came of age one day before the maturity of the bill, and resided in the same town as the drawer and indorser:—

Held, evidence for the jury, from which they might infer that the bill was accepted during the defendant's minority. *Roberts v. Bethell*, 218.

INFORMATION.

See CRIMINAL INFORMATION.

INFRINGEMENT.

See PATENT.

INSANITY.

Evidence of.]

See WILL.

INSOLVENT BANKS.

Bills of.]

See ASSUMPSIT.

INSOLVENT.

1. *Discharge without Adjudication.]* Where an insolvent, who has petitioned for his discharge under the 1 & 2 Vict. c. 110, is discharged out of custody by the default or consent of his detaining creditor, without any adjudication being made:—

Held, by LORD CAMPBELL, C. J., and COLERIDGE, J., (affirming *Grange v. Trickett*, 21 Law J. Rep. (N. S.) Q. B. 26; s. c. 7 Eng. Rep. 431,) that upon such discharge the vesting order becomes void, and that the property which had passed to the assignees under it revests in the insolvent. *Kernott v. Puttis*, 77.

2. *Vesting Order.]* *Held*, by EARLE, J., that the vesting order continues in force, notwithstanding such discharge, until made null by the Insolvent Court. *Ib.*

3. 1 & 2 Vict. c. 110.] Section 44 of the 1 & 2 Vict. c. 110, provides that, in case any prisoner as to whose estates and effects any vesting order shall have been made, shall, by the consent or default of his detaining creditor, be discharged out of custody without any adjudication being made, in such case no action shall be commenced against the provisional assignee, nor against any person duly acting under his authority, except to recover any property, &c., of such prisoner detained after an order made by the Insolvent Court for the delivery thereof and demand made thereupon. To an action of detinue, the plea stated proceedings in the Insolvent Court and the making of a vesting order, whereby the goods of the plaintiff in the declaration mentioned, became vested in S. S., the provisional assignee; and alleged that the defendant, as the servant and by the authority of the said S. S., so being such pro-

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- visional assignee after the making of the said vesting order, detained the said goods in the declaration mentioned. The replication alleged that, before the defendant detained the said goods, the plaintiff was discharged out of custody by the default of his detaining creditor, without any adjudication being made by the court, and that the defendant did not detain the said goods by virtue of any order, authority, or command of the said S. S. made or given to the defendant before the plaintiff was so discharged as aforesaid. On special demurrer to the replication : —
- Held*, that it admitted that the goods were detained by the defendant under the authority of S. S. given after the plaintiff's discharge, but before any order of the Insolvent Court for the delivery of the goods ; and that, even supposing on the discharge without adjudication, the property revested in the insolvent, the plea was an answer to the action. *Ib*.
4. *Pleading.*] *Held*, also, that the allegation in the plea, that the defendant, detained by the authority of the provisional assignee, was not premature, and might have been traversed by the replication. *Ib*.
5. *Void Conveyance — Intention to Petition.*] A tenant being indebted to his landlord for rent, and being in insolvent circumstances, proposed to and executed to the defendant, in April, 1850, a bill of sale of his farming stock and furniture ; and in June, 1851, petitioned the Insolvent Court for protection from process. The 7 & 8 Vict. c. 96, s. 19, after making void certain voluntary conveyances by parties in insolvent circumstances, provides, that no such conveyance shall be deemed void if made prior to three months before filing the petition, and not with the view or intention by the party so conveying of petitioning the court for protection from process. The judge directed the jury to consider whether the insolvent executed the bill of sale with the view or intention of petitioning the Insolvent Court for protection at any time when he might apprehend proceedings would be or were taken against him : —
- Held*, that this was a misdirection ; the question being, not whether the insolvent had a general intention at some future time of petitioning the Insolvent Court, but whether he had the present intention of so doing. *Thoyts v. Hobbs*, 421.
6. *Rehearing of Case.*] The Court for the Relief of Insolvent Debtors has no jurisdiction to rehear the case of an insolvent who has been discharged by the judge of a county court under the 10 & 11 Vict. c. 102, s. 2. *Phillipps, ex parte*, 34.
7. *Semble*, that the judge of the County Court has power to rehear the case. *Ib*.
8. *Right to Sue.*] An insolvent who has petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110, may sue for a debt which accrues due to him after the vesting order, and before his final discharge, unless the provisional assignee interfere. *Jackson v. Burnham*, 447.
9. *Herbert v. Sayer*, 5 Q. B. Rep. 965, affirmed. *Ib*.

INSPECTION OF DOCUMENTS.

1. 14 & 15 Vict. c. 99.] The 14 & 15 Vict. c. 99, s. 6, has not given to courts of common law a power to compel a discovery, by a bill or analogous proceeding — the only power given to them by it, is to allow an inspection by one litigant party, of documents in the custody or under the control of the other litigant party, with the restrictions or limitations pointed out in that section. *Hunt v. Hewitt*, 513.
2. *Jurisdiction.*] The 14 & 15 Vict. c. 99, s. 6, has not taken away the jurisdiction previously possessed by courts of common law, to order the inspection and copy of documents in the hands of an adverse party. *Ib*.
3. *Affidavit.*] Under the 14 & 15 Vict. c. 99, s. 6, where an inspection is litigated, the party applying for it must show by affidavit that an action or other proceeding is pending, and also circumstances sufficient to satisfy the court or judge, that there are in the possession or under the control of the opposite party certain documents

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relating to such action, &c. — a *prima facie* case calling for an answer, must at least be stated in this respect. *Ib.*

4. *Practice.*] Further, as the party making such application is in the same situation as a plaintiff in a court of equity, he must show — first, what is the nature of the suit, and of the question to be tried in it, and it seems, also, that he should depose in his affidavit to his having just grounds to maintain or defend it; secondly, the affidavit ought to state, with sufficient distinctness, the reason of the application, and the nature of the documents, in order that it may appear to the court or judge that the documents are asked in order to enable the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them. *Ib.*
5. To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them — or he may show on affidavit that the part concealed does not in any way relate to the plaintiff's case. *Ib.*

INSPECTION.

Of a Machine, Under 15 & 16 Vict. c. 83.]

See PATENT.

INSURANCE.

Policy — Statement — Warranty.] An assurance company effected a policy with a literary institution, to guarantee, to a certain amount, against loss which might be occasioned by the want of integrity, honesty, or fidelity of one R. W., in his employment as secretary to the institution. The basis of the contract was alleged to be a certain statement in writing, by the treasurer of the institution, lodged at the office of the company, containing a declaration of the truth of the answers to certain questions. There was likewise a proviso, that any fraudulent misstatement or suppression in that declaration should render the policy void from the beginning. The statement referred to, contained, *inter alia*, the following questions and answers: — First, "Is the applicant at present in your employment, and if so in what capacity, and has he hitherto performed the duties of his situation faithfully and to your satisfaction?" A. "He is secretary to the — Literary Institution." Secondly, "Is the applicant personally known to you, or any of your firm, or by whom has he been introduced or recommended to you?" A. "Only as above." Thirdly, "In what capacity do you intend to employ the applicant; and with reference to this question state, as far as circumstances will permit (A) the nature of his intended duties and responsibilities?" A. (A) "He is secretary of the — Literary Institution of which I am treasurer." (C) "The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced, and closed?" A. (C) "Examined by finance committee every fortnight." (D) "The salary or emolument, and when it will be paid to him, and how and when it will be paid?" A. (D) "80*l.* a year at present:—"

Held, that the statement that the accounts of R. W. would be examined once a fortnight by the finance committee of the institution did not amount to a warranty; and consequently, that an action was maintainable on the policy for a loss occasioned by his want of integrity in the service of the institution, although such loss was occasioned by their neglecting to examine his accounts in the manner specified in the policy. *Benham v. The United Guarantee and Life Assurance Company*, 524.

INTEREST.

See JUDGMENT.

ISLE OF WIGHT.

See BRIDGES.

JOINT-STOCK COMPANY.

1. *Action by Scrip-holder.*] The deed of settlement of a joint-stock company completely registered under the 7 & 8 Vict. c. 110, was executed by one fourth of the shareholders, and contained a clause providing that the shares of every subscriber who should not execute the deed within three months from its date should be forfeited, if the board of directors thought fit, and that the amount paid upon such shares should become the property of the company. Under this clause, the shares of a scrip-holder in the company, who had not applied to sign the deed within three months from its date, were declared forfeited, without any reasonable notice having been given, and a subsequent application to be allowed to sign was refused.

Held, in an action for such refusal, and for not causing a certificate of proprietorship of the shares to be delivered to the plaintiff, that the clause of forfeiture could not be objected to as being *ultra vires* or unreasonable, and that as the deed did not require notice to be given before forfeiture, no such notice was necessary; and, therefore, that after the forfeiture, the plaintiff's title to the shares ceased. *Stewart v. Anglo-Californian Gold Mining Company*, 51.

2. *Deposit and Transfer of Shares.*] The defendant being the registered owner of 200 shares of a joint-stock company deposited the certificates thereof with E. as a security for money advanced. He afterwards borrowed a further sum from an insurance office, of which C. was a director, and E. and C. being sureties for the repayment of that sum, he executed according to the Joint-stock Act a transfer to C. of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. Judgment for the recovery of the sum advanced having been obtained by the insurance office, and a judge's order *nisi* to charge the shares having been made, C. subsequently requested the joint-stock company to transfer the shares into his name, which they refused, and the shares remained standing in the name of the defendant.

The court made the judge's order absolute, holding that the shares were to be considered as standing "in the defendant's name in his own right," within the meaning of the 1 & 2 Vict. c. 110, s. 14, and that the relief of the creditors was in equity. *Fuller v. Earle*, 390.

3. *Who is a Shareholder — Liability for Calls.*] The defendant applied for, and obtained, shares in a projected company, the capital of which was to consist of 500,000l. in 50,000 shares, and paid the deposits thereon. The company was completely registered under the 7 & 8 Vict. c. 110, and the defendant's name was entered as a shareholder in the register of shareholders and in the schedule to the deed of settlement, but he never executed the deed of settlement, or any deed referring to it. The full amount of capital never was subscribed, but the company began business with less; but not succeeding, a private act of parliament was passed for the purpose of winding up the concern. This act recited the deed of settlement, and the facts as to the deficiency in the subscribed capital, and authorized the directors to make calls upon the shareholders and bring actions to recover such calls, and enacted that in such actions it should be sufficient to prove that the defendant was a holder of shares at the time of the call, and that the production of the register of the shareholders of the company should be *prima facie* evidence of the number of shares held by him. It also enacted, that except as otherwise provided by the act, every such call should be made according to the deed of settlement, and as regarded the liabilities of the shareholders, the forfeiture of shares, and otherwise, should be deemed to have been made under such provisions; and also that nothing in the act contained, except as therein expressly enacted, should render any shareholder or other person liable to the company, if such shareholder or other person would not have been liable thereto if the act had not passed:—

Held, in an action for a call under the private act, that the defendant was not liable as a shareholder or otherwise, as he had not executed the deed of settlement, or any deed referring thereto, and the private act only extended to such shareholders. *The Galvanized Iron Company v. Westoby*, 386.

4. *Conditional Subscription.*] *Held*, also, that even had the private act extended to persons who had agreed to take shares, he would not have been liable, as the accept-

Common Law.

ance of the shares was conditional upon the full capital being subscribed, and this condition had not been performed or waived.

5. *Contract — Principal and Agent.*] A joint-stock company, consisting of more than twenty-five members, was formed subsequently to the 5th of September, 1844, but not registered pursuant to the 7 & 8 Vict. c. 110. Its capital was divided into shares, and its profits divided among the holders of them, but any proprietor could transfer his shares without the consent of the rest. A., a member of this company, entered, by means of a memorandum made by B. his agent, into a contract with C. that the company should supply him with certain articles on certain conditions. Those articles were supplied accordingly, and were shown to be the property of the company:—

Held, that A. might sue C. on this contract. *Clay v. Southern*, 533.

JOINT TENANT.

See SETTLEMENT.

JUDGMENT.

1. *Satisfaction of.*] Where a judgment had been entered up, and a writ of execution for debt and costs had issued, before the commencement of stat. 1 & 2 Vict. c. 110:—

Held, that, by virtue of sect. 17, the judgment was not satisfied upon the levy, after the commencement of the act, of the debt and costs, and that it would not be satisfied until payment of interest from the commencement of the act until the satisfaction of the judgment. *Bishop v. Hatch*, 161.

2. *Interest.*] *Semble*, that the interest might be levied by virtue of a separate writ of execution, to be issued after the passing of the act. *Id.*
3. *Discharge of.*] The plaintiff having recovered judgment in an action against two defendants, issued two concurrent writs of *ca. sa.* thereon, and the defendants were taken in execution, but were discharged by the plaintiff's attorney, upon their making an arrangement for the payment of the debt. The plaintiff afterwards issued a writ of *fi. fa.* for the balance of the original debt, and the goods of one of the defendants were seized; but, upon payment of a certain sum under protest, the goods were released. A rule *nisi* was afterwards obtained by the defendant to procure a return of this money, on the ground that the original debt was barred by the defendants' discharge out of custody, as having been made either by the authority of or as having been ratified by the plaintiff. The court referred the matter to the Master to report thereon to the court; and he found that the discharge of the defendants had been ratified by the plaintiff: and therefore, the court made the rule to set aside the execution absolute. The plaintiff then brought an action upon the original judgment. The court, under the preceding circumstances, refused to order satisfaction to be entered up on the judgment-roll in the action. *Ward v. Broomhead*, 502.

See COSTS. JOINT-STOCK COMPANY.

Nunc pro Tunc.]

See PRACTICE.

Arrest of.]

See INDICTMENT.

When set Aside.]

See PRACTICE.

JUDICIAL ACT.

See BEER LICENSE.

Common Law.

JURISDICTION.

Ouster of.]

See CONDITION PRECEDENT.

Of Superior Courts.]

See COSTS.

Of County Court.]

See COUNTY COURT.

Of Court.]

See PRACTICE.

Of Judge to Issue a Writ of Procedendo.]

See PROCEDENDO.

Of Magistrate.]

See *Regina v. Hodgson*, 456. COUNTY COURT.

JURY.

What Question is not for.]

See CONTRACT.

Question for.]

See DISTRESS. PRACTICE.

LABOR AND SERVICES.

See CONTRACT.

LANDLORD AND TENANT.

Distress.] A landlord has a right to distrain upon his tenant at will. *Doe d. Benson v. Frost*, 506.

Tenancy.] After the tenant at will entered into possession there was an agreement for a lease of the premises, but no lease was ever prepared; on the back of the draft there was an indorsement made and signed between the parties; rent had been paid, and a receipt given for a quarters' rent, and a distress also had been put in by the landlord upon the tenant:—

Held, not sufficient to alter the original tenancy at will into a tenancy from year to year. *Ib.*

Use and Occupation.]

See RAILWAYS.

Right of Distress.]

See DISTRESS.

Remedies between.]

See ACTION ON THE CASE.

See ELECTIONS. LEASE. REPLEVIN. TRESPASS.

LARCENY.

1. *Trespass.]* Where a man drove away a flock of lambs from a field, and in so doing inadvertently drove away along with them a lamb, the property of another person, and, as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it:—

Held, that as the act of driving the lamb from the field, in the first instance, was a trespass, as soon as he appropriated the lamb to his own use, the trespass became a felony. *Regina v. Riley*, 544.

Common Law.

2. *Constructive Accessory.*] The prisoner M. had the charge of the prosecutor's warehouse, in which bags were kept; the prisoner S., for some years had been in the habit of supplying the prosecutor with bags, which were usually placed outside the warehouse, and shortly after so leaving them, either S. or his wife called and received payment for them. The prisoner M. went into his master's warehouse, and clandestinely removed twenty-four bags which had been marked by his master, and placed them outside the warehouse, in the place where S. used to deposit the bags before payment for them. Soon afterwards the wife of S. came and claimed payment for the said twenty-four bags. The prosecutor then sent for the prisoner S., who, upon being asked respecting the twenty-four bags, said they had been placed there an hour previously by him, and demanded payment for them. The jury found that the bags had been so removed in pursuance of a previous arrangement between the prisoners:—

Held, that M. was rightly convicted of larceny, and that S. was an accessory before the fact to the larceny. *Regina v. Manning*, 548.

3. *Custody of Property.*] Two men, J. and W., acting in concert, and intending to defraud S., entered the shop of S. and by means of an artifice induced him to draw a check on his bank for 42*l.*, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to S. of forty-two sovereigns, and that the prisoner W. was to remain at the shop till J. and S. went and returned from the bank.

At the bank, by the desire of S., the banker handed four ten pound notes and two sovereigns to the prisoner J., in the presence of S.

The prosecutor S., and the prisoner J., left the bank together, and while on their way back to S.'s shop, J. went into an inn-yard, and promising to return immediately, absconded with the four ten pound notes, and the two sovereigns, which he and the prisoner W. (who in the meantime had gone off from the shop with the forty-two sovereigns) appropriated to their own use:—

Held, that the misappropriation of the notes and two sovereigns was larceny, S. never having parted with the property and possession in them, and the prisoner J. having had no more than the bare custody of the money which he carried off. *Regina v. Johnson*, 570.

See BURGLARY. HUSBAND AND WIFE.

LAW AND FACT.

Question for the Jury.]

See CONTRACT. DISTRESS.

LEASE.

1. *Construction — Rent-Charge.*] M. H. and W. R., by indenture of February, 1805, granted and leased certain premises unto and to the use of J. H., his heirs, executors, administrators, and assigns forever, yielding and paying therefor a yearly rent. Proviso for re-entry on non-payment of rent. Covenant by J. A. for payment of the rent, for repairs, and for insurance:—

Held, that, in the absence of proof that the premises were, at the date of the instrument, in the occupation of tenants, and the expressed intention of the parties precluding the presumption of livery of seisin, the instrument could not operate as a conveyance of the fee subject to a rent-charge, but only to create a tenancy from year to year. *Robertson v. Gardener*, 236.

2. *Livery of Seisin.*] *Semble*, that if it had been necessary to presume livery of seisin in order to account for the possession under the instrument, the court would have made that presumption. *Id.*

What Constitutes.]

See LANDLORD AND TENANT.

Common Law.

LEASEHOLD.

Devise of.]

See WILL.

LEGACY.

1. *Chose in Action.*] The Wills Act (1 Vict. c. 26), does not enable a testator to bequeath a chose in action so as to pass the right of suing to the legatee. *Bishop v. Curtis*, 49.
2. *Felony.*] Where a party, who is afterwards convicted of felony, is entitled to a chose in action, the right of suing being in another in trust for him, that right of suit does not vest in the crown upon the conviction. *Ib.*
3. *Forfeiture.*] To an action by the executor of E. C., deceased, on a promissory note made by the defendant, payable to E. C., on demand, the defendant pleaded that E. C., by his will (made after the passing of the 1 Vict. c. 26) bequeathed the note to C. C.; that the plaintiff assented to the bequest, whereby C. C. became entitled to the said note, and the money due thereon; and that whilst the said C. C. was so entitled, he was convicted of felony, by reason whereof he forfeited to the crown the said note, and all interest therein, and causes of action in respect thereof: — *Held*, on general demurrer, that the plea was no answer to the action. *Ib.*

LEGACY DUTY.

Power to Charge Estate — Dower.] A special verdict stated that J. Major Lord H., by his will directed the purchase of estates in Suffolk to be made with the proceeds of his estates in Essex. The will contained a clause with a power enabling the tenant for life, who should be entitled to the rents of the estates to direct them to be sold, and a deed of settlement to be made of them, and that there should be inserted therein a power that the tenant for life should be entitled to the rents, and should have power to charge such estates with an annual sum not exceeding one third part of the annual value, for the benefit of any woman he might marry. The testator having died, was succeeded by his son, J. Minet Lord H., who charged the Suffolk estates with the payment of 2,000*l.*, free of taxes and other deductions, for the benefit of his wife, for her life; the said sum to be in the nature of, and in full, for her jointure, and to be in bar, lieu, and satisfaction of and for her dower or thirds, &c. The will then provided that, in the event of the testator not being authorized to charge the estates with so large a sum as 2,000*l.*, his other estates should be liable to supply the deficiency. The defendant was in possession of the estates, and was the heir of the second testator, J. Minet Lord H., who was the surviving trustee of the first testator. No deed of settlement was ever executed: —

Held, that this could not be considered as a purchase of the dower or thirds, but was an appointment of the legacy, upon condition; that the legacy was taken as a gift of the testator, and that the legacy duty was payable upon the interest of one third of the value of the rent of the Suffolk estates, to be ascertained on the death of the testator. *The Attorney-General v. Lord Henniker*, 374.

Quære, if this had been a condition annexed to the legacy by the second testator, whether the whole of the money received by the legatee would have been a legacy or whether a part of it would not have been a purchase of some interest that might reduce the duty to be paid upon the legacy. *Ib.*

LEX LOCI.

Proof of.]

See MARRIAGE. STATUTE OF FRAUDS.

LIABILITY.

What Barred by a Discharge in Bankruptcy.]

See BANKRUPT.

 Common Law.

LIMITATIONS.

See PRACTICE.

In Action Against Officers.]

See TRESPASS.

LIVERY OF SEISIN.

Presumed, When.]

See LEASE.

LUGGAGE.

See COMMON-CARRIERS.

LUNATIC.

See PAUPER. WILL.

MAINS.

Rates respecting.]

See RATES.

MAINTENANCE.

See PAUPER.

MANDAMUS.

1. *Discretion of Justices.]* The discretion of justices in enforcing a rule of sessions, which is not invalid or unreasonable, will not be interfered with. *Regina v. The Justices of Derbyshire*, 178.
2. *Rules.]* The sessions of D. had, as it was alleged, a rule by which appeals could not be entered after the day preceding the first day of the sessions, except by leave of the court. G. had given the necessary notices, but had not entered his appeal in accordance with the above rule. On the first day of the sessions a special application was made to the court to allow him to enter the appeal, which was refused:—*Held*, that although the court would not interfere with the discretion of the sessions where a distinct rule of practice was shown to exist, yet, as it did not distinctly appear upon the affidavits what the rule of practice really was, or how far it had been acted upon, a *mandamus* might go. *Ib.*

See INSOLVENCY.

MARRIAGE.

Proof of.] On a trial for bigamy a woman was called as a witness, who stated that she was present at a ceremony performed in a private house in Scotland, by a minister of some religious denomination; that she herself was married in the same way and that parties always married in Scotland in private houses:—

Held, that she was not a competent witness to prove the law of Scotland as to marriage, and that her evidence did not prove the fact of a marriage. *Regina v. Povey* 549.

Common Law.

MASTER.

Right of, To Sell Cargo for Repairs.]

See SHIPS AND SHIPPING.

MASTER AND SERVANT.

See SERVANT. SHERIFF.

MEMORANDUM.

See STAMP.

MERCHANDISE.

Liability of Passenger Carriers for.]

See COMMON-CARRIERS.

MINING.

See ACTION ON THE CASE.

MISDIRECTION.

See INSOLVENT.

MISNOMER.

See NAME.

MONEY LENT.

See ASSUMPSIT.

MONEY HAD AND RECEIVED.

See ASSUMPSIT. STOPPAGE IN TRANSITU.

MONTH'S NOTICE.

To a Servant.]

See SERVANT.

MORTGAGE.

1. *Of Personal Property — Effect of.]* Where a trader assigns part of his property, by way of mortgage, the question under the bankrupt laws is not whether putting the deed in force will put an end to his business, but whether it will make him insolvent. *Young v. Waud*, 462.
2. A manufacturer assigned all his machinery, by way of mortgage, to secure the amount of certain bills drawn by him and accepted by the consignees of his goods, which had been discounted by the mortgagee, and also of such other bills as should from time to time be discounted in like manner. The mortgagee was empowered,

Common Law.

after three days' notice to enter and take possession of all the machinery, and, after a sale of the same, to pay the amount of the expenses and the bills then due or running, and to pay the surplus to the mortgagors. At the time of the execution of this deed, the machinery was worth 1,500*l.*, and the mortgagor's property consisted of goods, 1,100*l.*, and good debts, 900*l.*, while his whole liabilities were, 2,900*l.* :—*Held*, that this deed was no evidence of an act of bankruptcy, although had it been acted upon, the mortgagor could not have carried on the particular business in which he was engaged. *1b.*

3. *Debt on Mortgage Deed.*] Money was borrowed by the E. U. Railway Company, under the powers conferred by a local act (7 & 8 Vict. c. 85,) whereby they were authorized to borrow, and to secure repayment by mortgage of the railway and future calls, (Sect. 37, and to fix the period for repayment, in which case they were to cause a period to be inserted in the mortgage deed, at the expiration whereof the principal and arrears of interest should be paid. (Sect. 49.) It was further provided, that if the principal and interest were not paid within six months after they had become payable, and after demand thereof in writing, the mortgagee or bond creditor might sue for the same, or if his debt amounted to 5,000*l.*, he might require the appointment of a receiver (Sect. 52); and that if the interest remained unpaid for thirty days after it had become due, and demand thereof made in writing, the mortgagee or bond creditor might sue in an action of debt, or might require the appointment of a receiver. (Sect. 51.) It was further enacted, that where no time was fixed in the deed or bond for the repayment of the money, the creditor might, at any time after twelve months from the date of the mortgage deed or bond, demand payment of the principal, with all arrears of interest, on giving six months' previous notice. (Sect. 56.) *Eastern Union Railway Co. v. Hart*, 535.

In an action of debt upon a mortgage deed executed by the company under this act, and which deed contained the following stipulation, "The principal sum to be paid on the 1st of January, 1851 :"—

Held, affirming the judgment of the court below, that the action could be maintained.

4. *Receiver.*] *Held*, also, that the right of action upon the mortgage did not depend solely upon sects. 51 and 52, nor were the conditions therein mentioned, namely, the expiration of six months in one case, and of thirty days in another, after demand of payment, conditions precedent to the bringing of an action upon such mortgage, but that such sections only recognized a preëxisting right of action, and added thereto another specific remedy, namely, the appointment of a receiver at the option of the borrower, after the expiration of the above period. *1b.*

See DISTRESS.

MORTMAIN.

Shares in a Bank.] A bequest of the proceeds of shares in a joint-stock banking company, formed under a deed of settlement, and which possessed freehold and copyhold property, does not come within the Statute of Mortmain, 4 Geo. 2, c. 36. *Myers v. Perigal*, 229.

MULTIFARIOUSNESS.

See PLEADING.

MUNICIPAL CORPORATION ACT.

See BURGESS LIST.

NAME.

Idem Sonans.] The omission of a mute letter in the name of a party to a cause, in the title of an affidavit, the word still being *idem sonans*, is no ground for discharging a rule obtained on such affidavit. *Gray v. Coombes*, 252.

Common Law.

NEGLIGENCE.

See COMMON-CARRIERS.

NEW TRIAL.

See VERDICT.

NOMINAL DAMAGE.

See TRESPASS.

NON-USER.

See ABANDONMENT.

NOTICE.

Of Bankruptcy—What is Not.]

See BANKRUPTCY.

Of Objection to Voter.]

See ELECTIONS.

See COMMON-CARRIERS.

NUNC PRO TUNC.

See PRACTICE.

OBJECTION.

To a Burgess List.]

See BURGESS LIST.

OFFICER.

Right of, To Arrest.]

See TRESPASS.

OFFICIAL ASSIGNEE.

Rights of.]

See BANKRUPTCY.

PAPER BOOKS.

See PRACTICE.

PARISH CONSTABLE.

See TRESPASS.

PARLIAMENT.

See ELECTIONS.

Common Law.

PAROCHIAL TAX.

See RATES.

PAROL CONTRACT.

See STATUTE OF FRAUDS.

PARTIES.

See JOINT-STOCK COMPANY.

PAUPER.

Lunatic — 12 & 13 Vict. c. 103.] The 12 & 13 Vict. c. 103, s. 5, extends to the maintenance of a pauper lunatic, born in Ireland, who has acquired no settlement in England, but has become irremovable by reason of five years residence in a parish within an union in England; and in such a case the burthen of maintaining the pauper in an asylum is cast upon the common fund of the union. *Regina v. Arnold*, 102.

See SETTLEMENT.

PATENT.

1. *Composite Substance*.] The use of the elements of a composite substance is a use of the composite so as to be an infringement of a patent for the use of the composite substance. *Heath v. Unwin*, 202.
2. Where the elements of a composite substance are used, and in the process of the manufacture the composite is itself formed, this is not the use of an equivalent for that substance, but the use of the substance itself. *Ib*.
3. *Infringement*.] A patent for the use of a substance in a process is infringed by the use of a chemical equivalent, known to be so at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colorable variation therefrom. Per ERLE, J. *Ib*.
4. *Evidence of — Specification*.] The plaintiff took out a patent for certain improvements in the manufacture of steel, and claimed "the use of carburet of manganese in any process whereby iron is converted into cast steel;" and in the description of his process he said that he proposed to make his improved steel by introducing into a crucible broken steel or malleable iron and carbonaceous matter, with from one to three per cent of their weight of carburet of manganese, and melting them together. The defendant put oxide of manganese and carbonaceous matter into the crucible with the iron, and produced the same result, and an action was brought against him for the infringement of the plaintiff's patent. At the trial it was proved that during this process the oxide of manganese and the carbonaceous matter combined, and formed a carburet of manganese, and then, in the same process, but at a higher temperature, this carburet acted upon the iron and produced the same result as that effected by the plaintiff's process. The learned judge directed the jury that there was no evidence of an infringement, and a bill of exceptions was thereupon tendered: —
Held, in error, (*dissentientibus* ALDERSON, B., and COLERIDGE, J.) First, that there was evidence for the jury of the infringement of the plaintiff's patent. *Ib*.

Common Law.

5. Secondly, that the discovery claimed by the patent was the use of the carburet of manganese, and that the plaintiff was not limited to the mode of working mentioned in his specification; and although the defendant's process might constitute a different manner of manufacturing carburet of manganese, yet if he used it in the conversion of iron into steel, he infringed the patent. *Ib.*
6. *Inspection of Machine.*] In an action for the infringement of a patent, the court will not grant an order under the 15 & 16 Vict. c. 83, s. 42, for an inspection of a machine upon an affidavit "that the machine used by the defendants is the same for which the plaintiff has obtained a patent. *Shaw v. The Bank of England*, 460.

Infringement of.]

See PRACTICE.

PAVING RATES.

See COUNTY COURT.

PAYMENT.

1. *By a Stranger.*] To an action of debt on simple contract, the defendant pleaded, that after the accruing of the debts and causes of action, and before suit, the plaintiff drew a bill on one A. B., who accepted the bill, and delivered it to the plaintiff for, and on account of the said debts and causes of action, and that the plaintiff received it from A. B., on such account; that the plaintiff, before suit, indorsed the bill to C. D., who was still the holder and entitled to sue A. B. thereon. *Belshaw v. Bush*, 269.

Held, a good answer to the action.

2. *Wankford v. Wankford* 1 Salk. 299; *Ayliffe v. Scrimshire*, Carth. 63; s. c. Comb. 123, and *Stracey v. The Bank of England*, 6 Bing. 754; s. c. 8 Law J. Rep. C. P. 234, considered and explained. *Ib.*

Of Debt Without Costs.

See BILL OF EXCHANGE.

In Bank Bills of Insolvent Banks.]

See NOTE, p. 68.

See ACCORD AND SATISFACTION. DISTRESS. SETTLEMENT.

PERJURY.

Prosecutor entitled to Costs — When.]

See COSTS.

PIPES.

Rates concerning Pipes.]

See RATES.

PLEADING.

1. *Appeal on a Dilatory Plea.*] A plea which does not merely raise an objection to a particular form of proceeding, leaving it to the plaintiff to proceed in a different form at another time, but which, if allowed, entirely bars the plaintiff from his remedy, is a peremptory and not a dilatory plea, within the 6 Geo. 4, c. 120, s. 5, and a decree thereon may be subject of appeal to the House of Lords. *Geils v. Geils*, 1.
2. *Dilatory Plea.*] A Scotchman was married in England to an English woman, and then returned to Scotland, where he was domiciled. Some years afterwards, the

Common Law.

wife quitted Scotland, and returned to England, where she lived separate from her husband. He came to England, and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and on that charge prayed for a divorce *a mensâ et thoro*. Judgment was in her favor. The husband returned to Scotland, where the wife instituted a suit for divorce *a vinculo*. The husband pleaded the proceedings in the Arches Court as a bar to further proceedings in Scotland:—

Held, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this house. *Id.*

3. *Defence to Covenants.*] A, a land-owner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that, if the bill of these projectors should not be passed within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A declared in covenant against these projectors on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law; that at the end of six months they had given notice to put an end to the agreement, and that they had not taken the plaintiff's land.

Held, that this plea was no answer to the action. *Capper v. Earl of Lindsay*, 9.

4. *Detinue — Special Traverse.*] In detinue for a deed, by which property was assigned to C. and S., on trusts for securing an annuity to the plaintiff, the defendant pleaded that C. and S. took possession of, and had a right to the deed; that before the plaintiff had possession of the deed, S. obtained possession of it, and C. died; and that afterwards S. delivered the deed to the defendant to keep, and that the defendant detained the deed from the plaintiff on behalf of S., and by his authority. The plaintiff replied, that, before the defendant was possessed of the deed, and after the death of C., one G., and not S., was possessed of the deed, and that G. delivered it to the defendant by the authority of the plaintiff, and that the defendant hath always held and still holds the same under such authority; without this, that S. delivered the deed to the defendant:—

Held, on special demurrer, that the replication was good, the traverse that S. delivered the deed to the defendant being a material traverse. *Foster v. Crabb*, 215.

5. *Held*, also, that the inducement to the special traverse was not bad for saying that the defendant "still holds" the deed by the plaintiff's authority. *Id.*
6. *Damages — Demurrer.*] A declaration in *assumpsit* stated that the defendant was the owner of a certain ship at a certain port beyond the seas, and bound from thence to London; that the plaintiffs caused certain goods to be shipped on board the said ship at the said port, to be carried thence to London, and then delivered to the plaintiffs for certain freight; that the ship set sail and proceeded on her voyage; that having been injured by tempestuous weather, the master was obliged to put into the port of Monte Video, in order to have her repaired; that to pay for these repairs, it became necessary for the master to raise money, and without his so doing the vessel would have been unable to leave the port; and that the master not being able to obtain the money otherwise, took the goods of the plaintiffs and sold them for a certain sum, with which he paid the expenses of the repairs; that the defendant promised to pay the plaintiffs the value for which the goods would have been sold had they been delivered by the defendant to the plaintiffs in London.

Plea, so far as the declaration claims or seeks to recover damages beyond the value of the ship and freight thereafter mentioned, in respect of the breaches of promise

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- complained of, that the plaintiffs ought not to maintain their action to recover damages to a greater amount than aforesaid, because, after the goods were shipped, and before any part had been conveyed to London, and whilst they were in the custody and under the control of the master, the master wrongfully and without any authority from the defendant, and without his knowledge, privity, or consent, sold the goods, and the defendant thereby was unable to deliver them to the plaintiffs. That the defendant, at the said time when, &c., was the owner of a British ship duly registered; that the goods were shipped by being received into the custody of the master; and that the defendant never personally accepted or received, nor did he interfere with them or the shipping or the sale, except as such owner of the vessel; that the shipping and sale took place after the 1st of September, 1813, and that the sale was done without the fault or privity of the defendant; and further that the value of the ship, together with the value of the freight due or to grow due during the voyage, did not exceed a certain sum therein named:—
- Held*, on special demurrer, first, that the plea was bad, as it was pleaded merely to the damages. *Atkinson v. Stephens*, 407.
7. Secondly, that when goods forming part of the freight of a ship have been sold at a an intermediate port to defray expenses necessarily incurred in repairing the vessel, the merchant is not entitled to claim from the ship-owner the price which they might have realized at the port of delivery unless the ship arrives; and that as the declaration did not contain any averment of the arrival of the ship at her port of destination it was bad. *Ib.*
8. *Semble*, that the plea did not bring the case within the 53 Geo. 3, c. 159. *Ib.*
9. *Trespass — Distress — Multifariousness.*] To an action of trespass for breaking and entering the plaintiff's house and seizing his goods, the defendant pleaded that one Thomas held a house as tenant to one Payne, at a certain rent; that the rent was in arrear; that the said goods, being the goods of Thomas, were fraudulently and clandestinely conveyed by him from his house to prevent a distress, and were, with the plaintiff's consent, placed in the plaintiff's house; whereupon the defendant, as bailiff of Payne, and by his command, seized the goods as a distress.
- Replication, that the said goods were not the goods of Thomas, nor were they fraudulently and clandestinely conveyed away by Thomas to prevent a distress:—
- Semble*, that the replication was not open to the objection of multifariousness, but that it was a good answer to the plea. *Thomas v. Walkins*, 489.
10. *Argumentative Denial.*] To an action on the case, in which the declaration stated that the defendants were common-carriers, and that they received from the plaintiff, as such common-carriers, a certain package, to be safely carried and to be delivered for him at a place mentioned, and that the defendants did not safely carry the package, but that through their negligence it was lost; the defendants pleaded that, at the time they received the package, they gave the plaintiff notice that they would not be responsible for packages of a particular description, under which this particular package fell, unless their contents were declared; and that the contents of this package were not declared; and that the defendants did not consent to be responsible contrary to the terms of such notice. Verification:—
- Held*, that the plea amounted to an argumentative denial of the bailment as alleged in the declaration. *Crouch v. The London & N. W. Railway Co.*, 498.
11. *Demurrer — To Damage only.*] A declaration stated, that, by a deed between B. of the first part, the defendants of the second part, and the plaintiff of the third part, after reciting that B. had been appointed collector of poor rate for the parish of D., and that he had been required to find security for the faithful discharge of his duties, and that the defendants had consented to give such security, the defendants as surety did covenant with the plaintiffs that B. should at all times, whilst he continued in his said office, faithfully account for all sums which he should receive: And the defendants further covenanted, "that a certificate under the hand of the auditor of the district, stating the amount of loss, should be conclusive evidence against the defendants of the truth of the certificate, and that the policy had become forfeited thereby to the amount of the loss stated in such certificate, and should form a valid and binding charge and claim against the defendants, without any further or other

proof being given by the plaintiffs in any action of the amount of such loss; or that the same had been occasioned through the default of B. The declaration then averred, "that, after the making of the deed, B. received divers moneys which he did not account for, and that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises, to the amount of 800*l.*, and alleged, as a breach, the non-payment of that sum by the plaintiffs. Plea to the declaration, so far as related to the auditor having certified that for thirteen years before the making of the deed, B. was collector, and during that time had not accounted for divers sums which he received, and by reason thereof was, at the time of making the deed in arrear; and that the loss so certified was the amount of loss occasioned as well by such arrears as by the non-accounting in the declaration mentioned; without this, that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises in the declaration mentioned to the amount of 800*l.* :—

Held, on special demurrer, that the plea was bad, as being a plea to the damage only. *The Guardians of Romford Union v. The British Guarantee Association*, 504.

12. *In Trespass.*] To a declaration in trespass, for breaking and entering a close of the plaintiff, called the stable, and breaking the doors thereof, and for seizing and carrying away divers goods and chattels of the plaintiff therein, the defendant pleaded, under the 11 Geo. 2, c. 19, s. 1, that at the time when the trespasses were committed, one O. O. was tenant of certain premises to the defendant at a certain rent, and that half a year's rent was then due to the defendant from the said O. O., and in arrear and unpaid; and that, within thirty days before the said time when, &c., O. O. fraudulently and clandestinely conveyed from the premises held by him as such tenant, the goods and chattels in the declaration mentioned, being the proper goods and chattels of the said O. O., in order to prevent the defendant from distraining them for the rent in arrear; and that, because the said goods and chattels so fraudulently and clandestinely conveyed by O. O. still remained in the said close in which, &c., and were there locked up, to prevent them from being seized as a distress for the said arrears of rent, the defendant, whilst the rent remained due, and within thirty days after the said goods and chattels had so been clandestinely and fraudulently conveyed and locked up, entered the said close, in order to seize and take the said goods and chattels as a distress for the said arrears of rent so due, and did at the time when, &c., and within thirty days after the said goods and chattels had been so conveyed as aforesaid, seize them as a distress for the said arrears of rent; and that, because on that occasion the said goods and chattels were put and kept in the close locked up, so as to prevent them from being seized as a distress for the said arrears of rent, and so that the defendant could not, without breaking open and entering the said close seize the said goods, the defendant was obliged and did in order to seize the said goods, first calling to his assistance the constable of the place where the said close and goods were, according to the form of the statute, and with his aid and assistance, in the day time break open and enter the said close, in order to seize the said goods and chattels for the said arrears of rent, according to the statute; and that the defendant in so doing did no unnecessary damage, &c. :—

Held, first, that although it was stated in the plea that the goods were the tenant's at the time of the removal, it admitted them to be the plaintiff's at the time of the seizure, as averred in the declaration, and therefore, that the plea was not objectionable in form, as amounting to an argumentative traverse, that at the time of the trespass they were the goods of the plaintiff. *Williams v. Roberts*, 482.

13. *Held*, secondly, that the plea afforded a good *prima facie* defence to the action within the 11 Geo. 2, c. 19, s. 1. It is unnecessary, in a plea framed under this statute, to show that the goods have not been made the subject of a *bona fide* sale to persons not privy to the fraudulent removal, as provided by the 2d section; that fact must be replied. *Ib.*

14. It is also unnecessary to state in the plea, that the party upon whose land the goods are seized is privy to the fraud; and a previous request is unnecessary, in order to give the landlord the right to break into the premises for the purpose of seizing the goods. *Ib.*

See BANKRUPTCY. CONDITION PRECEDENT. CONTRACT. PAYMENT. PRACTICE. RAILWAYS. WAY.

Common Law.

Averment of Willingness to Perform.]

See COVENANT.

Of Accord and Satisfaction.]

See ACCORD AND SATISFACTION.

Several Pleas — At the same Time.]

See PRACTICE.

POLICY.

Of Insurance — Construction of.]

See INSURANCE.

POWER.

Exercise of.]

See DEED.

PRACTICE.

1. *Right to Begin.*] Where a petition to dismiss an appeal for incompetency has been directed by the appeal committee to be argued at the bar of the house of lords, the counsel for the petitioner is entitled to begin. *Geils v. Geils*, 1.
2. *Inspection of Machinery.*] Under the 42d section of the stat. 15 & 16 Vict. c. 83, which empowers a court of common law to order "an injunction, inspection, or account," in an action for the infringement of a patent, an inspection of machinery may be granted. But such inspection will not be granted as of course, and without the party applying for it showing at least that it is material and really wanted for the purpose of the cause. *Amies v. Kelsey*, 169.
3. *Application.*] The application may be made before declaration. *Ib.*
4. 15 & 16 Vict. c. 76.] Orders under the 17th section of the Common Law Procedure Act will in general be granted absolute in the first instance, and need not be served. *Barringer v. Handley*, 254.
5. 15 & 16 Vict. c. 76 — *Statute of Limitations.*] An original writ of summons expired on the 8th of October before the Common Law Procedure Act came into operation. In order to save the Statute of Limitations, the court directed an *alias* writ to issue under the Uniformity of Process Act. *Gapp v. Robinson*, 253.
6. *Substantial Justice.*] The court cannot depart from a general rule of practice in order to do substantial justice in a particular case. *Freeman v. Tranch*, 224.
7. *Judgment Nunc pro Tunc.*] The court gives a party leave to enter judgment *nunc pro tunc* after the expiration of two terms, only when the delay has been the act of the court itself. Therefore, where the executrix of a plaintiff was unable to get probate of the will on account of a *caveat* entered in the Ecclesiastical Court by the defendant for the purpose of delay, this court, though reluctantly, refused to give leave to enter judgment *nunc pro tunc* after the expiration of two terms. *Ib.*
8. *Writ of Trial — Assessor's Notes.*] A rule *nisi* for a nonsuit in a cause tried before the assessor of the Liverpool Passage Court was moved for by counsel and granted. The rule was drawn upon reading the writ of trial and an affidavit verifying the assessor's notes: —
Held, on cause shown against the rule, that without the affidavit the court had no materials on which to entertain the motion. *Winch v. Williams*, 228.
9. *Affidavit.*] In the affidavit the deponent described himself as "S., clerk to E. J., Esq., barrister-at-law and assessor of the Court of Passage of the borough of L.:" —
Held, insufficient for not stating deponent's place of residence. *Ib.*
10. *Appeal — Paper Books.*] The court refused to hear an appeal (or to allow it to stand over,) where the appellant had failed, on the respondent's default, to deliver copies of the case to the junior puisne judges. *Sheddon v. Butt*, 325.

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11. *Special Jury.*] Where the defendant has duly obtained a rule for a special jury, and the jury has been struck and reduced, it is not competent to the court to direct that the cause be tried by a common jury, on the defendant's failure to summon a special jury. *Newman v. Graham*, 326.
12. *Notice of Trial.*] In an action on a judgment the defendant pleaded *nul tiel* record. The plaintiff joined issue, and gave notice on Saturday of his intention to produce the record on the following Monday :—
Held, that the notice was sufficient. *Maguire v. Kincaird*, 357.
13. *Several Pleas.*] A traverse of excuse for profert may be pleaded with other pleas in bar. *Porch v. Cresswell*, 385.
14. *Demurrers — Common Law Procedure Act.*] Special demurrers pending at the time when the Common Law Procedure Act came into operation are not affected by its provisions, but must be decided according to the previous law. *Pinkhorn v. Sonster*, 415.
15. *Common Law Procedure Act.*] Where an appearance *sec. stat.* has been entered before the 24th of October, when the 15 & 16 Vict. c. 76, came into operation, the 27th and 28th sections of that act do not apply. *Goodliffe v. Neaves*, 419, and see *Pigot v. Jackson*, 421.
16. *Appearance Sec. Stat.*] Therefore, where a writ was issued on the 29th of September, upon which an appearance *sec. stat.* was entered on the 8th of October, and on the 27th of October, a declaration filed, with a notice to plead indorsed thereon, and no plea pleaded :—
Held, that judgment signed, without any notice of filing the declaration having been given to the defendant, was irregular, and the judgment and execution thereon was set aside. *Ib.*
17. *Demurring and Pleading.*] Where a party applies for leave to plead by way of traverse, and demur to the same pleading, under the 15 & 16 Vict. c. 76, s. 80, he ought to swear that the allegations proposed to be traversed are untrue. *Lumley v. Gye*, 442.
18. *Form of Oath.*] *Semble* — that in such cases if the facts are within his own personal knowledge, he must swear positively to that effect ; if not, then that he is so informed and believes ; and if a third person is vouched he should show either that he has made inquiry of that person, or that it would be impossible or inconvenient to do so. *Ib.*
19. In an action on a contract the court allowed the defendant both to plead and demur to the declaration, although the validity of the contract had been affirmed on a motion for an injunction in the Court of Chancery, to which the defendant was a party, and in the decision of which court he had acquiesced. *Ib.*
20. *Rule to Plead — Time to Plead.*] An order to plead several matters was obtained after the rule office was closed, upon the day that the time for pleading expired. The pleas were delivered the same evening, with a copy of the order and a notice that the rule would be drawn up and served as soon as it could be obtained from the office. At ten o'clock the following day the plaintiff signed judgment :—
Held, that the judgment was regular. *Glen v. Lewis*, 461.

See AFFIDAVITS. BAIL. CENTRAL CRIMINAL COURT. COSTS. INSPECTION OF DOCUMENTS. NAME. PATENT. PROCEDENDO. RATES. *Saunders v. Davies*, 532. WITNESS.

PREFERENCE.

Of Creditors.]

See INSOLVENT.

PREROGATIVE.

See LEGACY.

Common Law.

PRESCRIPTION.

See ABANDONMENT.

PRESUMPTIONS.

A Bill of Exchange is presumed to be accepted at or near its date. *Roberts v. Bethell*, 218.

Of Livery of Seisin.]

See LEASE.

PRINCIPAL AND AGENT.

See DISTRESS. JOINT-STOCK COMPANY. SHERIFF.

PRINCIPAL AND SURETY.

Covenant of Surety—Pleading.] A declaration stated, that, by a deed between B. of the first part, the defendants of the second part, and the plaintiff of the third part, after reciting that B. had been appointed collector of poor rate for the parish of D., and that he had been required to find security for the faithful discharge of his duties, and that the defendants had consented to give such security, the defendants as surety did covenant with the plaintiffs that B. should at all times, whilst he continued in his said office, faithfully account for all sums which he should receive: And the defendants further covenanted, "that a certificate under the hand of the auditor of the district, stating the amount of loss, should be conclusive evidence against the defendants of the truth of the certificate, and that the policy had become forfeited thereby to the amount of the loss stated in such certificate, and should form a valid and binding charge and claim against the defendants, without any further or other proof being given by the plaintiffs in any action of the amount of such loss; or that the same had been occasioned through the default of B." The declaration then averred, "that, after the making of the deed, B. received divers moneys which he did not account for, and that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises to the amount of 800*l.*, and alleged, as a breach, the non-payment of that sum by the plaintiffs. Plea to the declaration, so far as related to the auditor having certified, that for thirteen years before the making of the deed, B. was collector, and during that time had not accounted for divers sums which he received, and by reason thereof was, at the time of making the deed in arrear; and that the loss so certified was the amount of loss occasioned as well by such arrears as by the non-accounting in the declaration mentioned; without this, that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises in the declaration mentioned to the amount of 800*l.* :—

Held, on special demurrer, that the plea was bad, as being a plea to the damage only. *The Guardians, &c. of Romford Union v. The British Guarantee Association*, 504.

See BANKRUPT.

PRIVILEGE.

From Arrest.]

See ARREST.

PROBATE.

Of Wills.]

See WILL.

Common Law.

PROCEDENDO.

Power of Judge — Certiorari.] A judge at chambers has jurisdiction to make an order for the issuing of a writ of *procedendo* to send back proceedings removed by *certiorari* from an inferior court, and it is a matter for the discretion of the judge whether or not a summons to show cause should not in the first instance be granted. *Regina v. Scaife*, 147.

PROHIBITION.

See COUNTY COURT. FRIENDLY SOCIETIES ACT.

PROMISSORY NOTE.

See BILL OF EXCHANGE.

PROSECUTOR.

When Entitled to Costs.]

See COSTS.

PROTECTION.

From Legal Process.]

See INSOLVENT.

PROVISIONAL COMMITTEE.

Liability of.]

See RAILWAYS.

PUBLIC BUILDING.

What is, under 34 Geo. 3, c. 98.]

See RATES.

PUBLIC COMMISSIONERS.

Power to Borrow Money.]

See FRAUD.

PUBLIC PURPOSES.

See RATES.

QUARTER SESSIONS.

See MANDAMUS.

RAILWAYS.

1. *Agreement with Landowner.*] A, a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided that, if the bill of these projectors should not be passed

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within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th of March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A declared in covenant against these projectors on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law; that at the end of six months they had given notice to put an end to the agreement; and that they had not taken the plaintiff's land.

Held, that this plea was no answer to the action. *Capper v. Earl of Lindsay*, 9.

2. *Liability for Use and Occupation.*] Where a corporation have actually used and occupied land for the purpose of their incorporation, by the permission of the owner, *semble*, that they are liable to be used in assumpsit for use and occupation, notwithstanding they have not entered into a contract under their common seal. *Lowe v. The London and North-Western Railway Co.* 18.

3. *Implied Contract.*] But in the case of a railway company, sued under the above circumstances, where the 8 Vict. c. 16, s. 97, (the Companies Clauses Consolidation Act,) provides that any contract, which, if made between private persons, would be valid, although made by parol only, may be made by parol on behalf of the company by the directors, and shall be binding on the company:—

Held, that such a contract might be presumed to have been entered into, and that the company was, therefore, liable to the action. *Ib.*

4. *Winding-up Acts.*] The 12 & 13 Vict. c. 108, (which came into operation on the 1st of August, 1849,) by section 1, enacts, that the Joint-stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45,) shall not apply to railway companies incorporated by act of parliament. The 13 & 14 Vict. c. 83, (passed on the 14th of August, 1850,) by section 30, provides, that notwithstanding the provision in the 12 & 13 Vict. c. 108, that act, as well as the 11 & 12 Vict. c. 45, shall apply to any incorporated railway company, in respect of which an order for winding it up may have been made previous to the passing of the act of 1849, and that the proceedings for winding up the same shall proceed and be carried on under the Winding-up Acts of 1848 and 1849, or either of them:—

Held, that this clause was retrospective in its operation, and rendered valid proceedings for the purpose of winding up an incorporated railway company taken before the 14th of August, 1850. *McKenzie v. Sligo & Shannon Railway Co.* 37.

5. *Dissolution.*] The dissolution of a company by an order absolute under the Joint-stock Companies Winding-up Act, 1848, (11 & 12 Vict. c. 45,) is no bar to an action against the company, by a creditor. Neither can the omission by such creditor to prove his debt before the Master in Chancery be pleaded in bar to such an action; the appropriate remedy being under section 73, by an application to a judge to stay proceedings in the action until after proof made. *Ib.*

6. *Conversion by a Railway Carrier.*] The plaintiffs intrust goods to the Y. and N. M. Railway Company, to be conveyed from H. to N. The goods arrive at N., the defendants' station, by the A. railway, belonging to an intermediate company. The plaintiffs demand them of the defendants, offering to pay any charges or lien, but the defendants refuse to deliver them up, upon the ground that by an agreement with the A. company, the latter had no right to bring such goods to the defendants' station, and insist upon their being taken back to the A. line:—

Held, that the defendants were liable in trover for the goods; that the detention of them by the defendants, after a demand made upon their station-master, was sufficient evidence of a conversion; and that the plaintiffs were entitled to have their goods, though brought by mistake or without right on the premises of the defendants. *Rooke v. The Midland Railway Co.* 175.

7. *Semble*, it was unnecessary for the plaintiffs to show, when they demanded the goods, that they had paid all charges of the other companies, or to produce an authority from those companies for the delivery of the goods. *Ib.*

8. *Covenant with.*] An indenture between the plaintiffs below and the defendants below, (a railway company,) after reciting that the defendants were desirous of being supplied with 350,000 railway sleepers, and that the plaintiffs were willing to supply them according to the terms of a specification and tender, contained a covenant by the plaintiffs that they would supply the sleepers within the time specified, "as, and when, and in such quantities, and in such manner," as the engineer of the company by order in writing, "from time to time, or at any time within the period limited by the specification, should require." The specification stated that the number of sleepers required was 350,000; that one half would have to be delivered in 1847, and the remainder by midsummer, 1848. The deed also contained provisions that the engineer might vary the times of delivery; that the company should retain 2,000L in their hands as security for the performance of the contract, and should pay it over within two months after all the sleepers had been delivered; and that the contract might be put an end to upon default made by the plaintiffs, or upon their bankruptcy or insolvency:—

Held, First, that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers. *The Great Northern Railway Co. v. Harrison*, 189.

9. *Condition Precedent.*] Secondly, that an order by the engineer was a condition precedent to any delivery of the sleepers by the plaintiffs. *Ib.*

10 Thirdly, that the company were bound to cause such order to be given within the time limited by the specification. *Ib.*

11. Fourthly, that although the engineer had power to alter the time for the delivery of the sleepers, such power was to be exercised within the period limited by the specification. *Ib.*

12. Fifthly, that the engineer as to matters in which he had a discretion, *e. g.* as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties, but as to giving the order for the delivery he was a mere agent of the company. *Ib.*

13. *Construction.*] The only legitimate rule of construction is to ascertain the meaning from the language used in the instrument coupled with such facts as are admissible in evidence to aid its explanation.—Per PARKE, B. *Ib.*

14. *Readiness—Reading.*] In an action upon the above deed, on the ground that the company had not given any order for the delivery of sleepers within the specified period:—

Held, that it was unnecessary to aver readiness and willingness to deliver them, as the plaintiffs were not bound to be ready and willing until the order was given. *Ib.*

15. *Contract with Director of Company.*] The 85th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, enacts that "no person interested in any contract with the company shall be capable of being a director, and no director shall be capable of being interested in any contract with the company during the time he shall be a director." The 86th section enacts, that "if any director, at any time subsequent to his election, be either directly or indirectly concerned in any contract with the company, then the office of such director shall become vacant, and he shall cease from voting or acting as director:—"

Held, that if a contract be entered into by a director with the company after his election, it is not rendered void, but the office only of a director is vacated. *Foster v. The Oxford, Worcester, &c. Railway Co.* 306.

16. *Pleading.*] Covenant by three plaintiffs against an incorporated company for not accepting goods according to a mutual agreement under seal. Plea, that at the time of making the agreement one of the plaintiffs was a director of the company:—

Held, bad on general demurrer. *Ib.*

17. *Tunnel—Deviation.*] The effect of the 13th, 14th, and 15th sections of the Railways Clauses Consolidation Act, 1845, 8 Vict. c. 20, taken together, is, in the case of a tunnel, marked in the deposited plans, that the tunnel must be made in the exact position indicated, and that the line cannot deviate at all at that portion of it without the consent required by the 13th section, or special powers in the local act. *Little v. The Newport, Abergavenny, &c. Railway Co.* 309.

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A railway company, therefore, without having this consent or special powers, wrongfully deviated where a tunnel had been marked, have not the duty imposed upon them of constructing a tunnel in the corresponding portion of the deviating line. *Ib.*

18. *Quere*, whether a similar construction of the act does not apply in the case of all "engineering works?"

19. *Semle*, that a tunnel made "by cut and cover" is a tunnel within the meaning of the act. *Ib.*

20. *Agreement to pay for Land.*] A railway company, who were promoting in parliament a bill for an extension of their line, which, if made, would pass through the lands of the plaintiff, covenanted with the plaintiff, "that in the event of the proposed bill passing in the then session of parliament, the company should, before they should enter upon any part of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion not exceeding forty-three acres, which the company might, under the powers of their act, require and take for the purposes of their undertaking; and that, in addition to purchase-money as aforesaid, the company should pay to the plaintiff, before they should enter upon any part of the said land, 7,100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands not exceeding forty-three acres to be taken by them."—

Held, that the company were not liable to pay either of these sums, unless they entered upon some part of the plaintiff's lands. *Ib.*

21. *Illegal Covenant.*] *Held*, also, that an absolute covenant to pay these sums to the plaintiff by the company would be *ultra vires* and void. *Ib.*

22. *Contract to pay Engineer.*] In an action by an engineer against a provisional committeeman of a railway company, it appeared that, at a meeting of the committee, at which the plaintiff was present, it was resolved, "that the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the company, and that no such responsibility shall attach to them." At another meeting at which the plaintiff was also present, a resolution was passed, which contained a statement that the plaintiff had said "that he would make no claim for his services until there should be sufficient funds of the company to meet any demand he might be entitled to make." The plaintiff stated in a letter, that "he never understood that, unless the project were successful, the engineers were to abandon all claims; but he did understand that the individuals comprising the committee were not to be held personally liable." At a subsequent meeting of the committee, it was resolved, "that the committee bind themselves to be answerable to the extent of 1,000*l.*, to be applied to engineering and surveying purposes." The scheme was abandoned, and deposits to the amount of 4,168*l.*, which had been received by the committee, were returned to the shareholders:—

Held, that the defendant was not responsible, the contract being that the plaintiff should be paid out of such funds as could be properly applied in satisfaction of his claim, and there were no funds of that description. *Landman v. Entwistle*, 491.

23. *Liability of a Company.*] Where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those purposes and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment, if money be so borrowed and so secured, and not duly repaid, an action may be maintained against the corporation on breach of the covenant, although there are no specific statutory provisions enabling them to bind themselves by such a covenant. *Eastern Union Railway Co. v. Hart*, 535.

24. *Mortgage by a Company.*] Money was borrowed by the E. U. Railway Company, under the powers conferred by a local act (7 & 8 Vict. c. 85,) whereby they were authorized to borrow, and to secure repayment by mortgage of the railway and future calls, (Sect. 37,) and to fix the period for repayment, in which case they were to cause a period to be inserted in the mortgage deed, at the expiration whereof the principal and arrears of interest should be paid. (Sect. 49.) It was further provided, that if the principal and interest were not paid within six months after they had become payable, and after demand thereof in writing, the mortgagee or bond creditor might sue for the same, or if his debt amounted to 5,000*l.*, he might require the appointment of a receiver (Sect. 52); and that if the interest remained unpaid for

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thirty days after it had become due, and demand thereof made in writing, the mortgage or bond creditor might sue in an action of debt, or might require the appointment of a receiver. (Sect. 51.) It was further enacted, that where no time was fixed in the deed or bond for the repayment of the money, the creditor might, at any time after twelve months from the date of the mortgage deed or bond, demand payment of the principal, with all arrears of interest, on giving six months previous notice. (Sect. 56.)

25. *Debt.*] In an action of debt upon a mortgage deed executed by the company under this act, and which deed contained the following stipulation, "The principal sum to be paid on the 1st of January, 1851:"—

Held, affirming the judgment of the court below, that the action could be maintained. *Ib.*

26. *Receiver.*] *Held*, also, that the right of action upon the mortgage did not depend solely upon sects. 51 and 52, nor were the conditions therein mentioned, namely, the expiration of six months in one case, and of thirty days in another, after demand of payment, conditions precedent to the bringing of an action upon such mortgage, but that such sections only recognized a preëxisting right of action, and added thereto another specific remedy, namely, the appointment of a receiver, at the option of the borrower, after the expiration of the above period.

27. *Hart v. Eastern Union Railway Company*, 8 Eng. Rep. 544, affirmed. *Ib.*

See COMMON-CARRIERS.

RATES.

1. *Highway Rates.*] By the Ashton-under-Lyne Improvement Act, 12 & 13 Vict. c. 35, s. 25, power is given to the mayor, aldermen, and burgesses, to make and levy a highway rate upon the occupiers of all messuages, houses, &c., lands, tenements, and hereditaments within the borough, for maintaining and repairing "the present highways, within the borough, when sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, &c., and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewers under the same." The borough of Ashton-under-Lyne consists of a part of one of the four divisions of the parish of Ashton-under-Lyne, and the whole of another of such divisions, the latter being subdivided into two districts; and before the passing of the above act each of such districts separately maintained its own highways, and had its own surveyor. The greater part of one district was a country district. After the passing of the said act, the mayor, &c., acting as surveyors, laid a rate on the ratable property within each of the said districts, exclusively for the repair of such highways within them as had not been sewered, drained, levelled, paved, flagged, and otherwise completed to the satisfaction of the mayor, &c.:—

Held, that under the above section of the special act, taken in connection with sections 48 and 49, of the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, the mayor aldermen, and burgesses of the borough were empowered to make two general rates within the borough, one for the repair of the urban streets within the 25th section of the special act, and the other for the repair of the rural ways not within that section, and, therefore, that the rate in question was bad. *Regina v. Ashton*, 104.

2. *Poor Rates — Waterworks.*] The commissioners of the Huddersfield Waterworks, under two private acts of parliament, were the proprietors of reservoirs, &c., in the township of Longwood, for the supply of water to the town of Huddersfield, and to secure a supply of water to certain mill-owners and occupiers in Longwood. The commissioners were bound by their acts to furnish water gratis in case of fire, to supply it at 1d. per 100 gallons for watering the streets, and to the consumers at certain specified rates so calculated that the water rents were not in any one year, after payment of the expenses, to exceed 7l. 10s. per cent. on the amount which should be owing by the commissioners in respect of the loan which they were empowered to raise on mortgage of the works and water rents, and after the discharge of the whole of the said loan, the water rents were to be reduced so as merely to cover current

expenses. The commissioners were rated to the relief of the poor on the sum of 490*l.*, the sessions finding that sum to be the estimated net ratable value of all the reservoirs, pipes, and other apparatus in Longwood, taken in connection with, and as part of the entire works in Longwood and Huddersfield, being made up of 300*l.* the estimated net annual value of all the reservoirs, and 190*l.*, the net annual value of the pipes and other apparatus in Longwood. The sessions also found that a tenant of the entire waterworks, if released from the restrictions in the acts of parliament, and able to exercise his discretion as to the amount of water rents and rates, might calculate with reasonable certainty, on a gross revenue of 2,000*l.*, and that, after deducting 800*l.*, the fair average of the current annual expenses, and the sum of 1,100*l.*, proved and admitted to be a proper annual deduction for repairs, renovations, and tenant profits, the residue of 1,100*l.* represented the net ratable value of the entire works; but that if such tenant was to be considered as subject to the restrictions in the acts, he could make no profit at all:—

Held, by COLERIDGE, J., that substantially the consumers, and not the commissioners, as a separate body, were the occupiers and the parties rated, and that the use and enjoyment of the water, and not merely the water rents, constituted the value of the occupation. That the restriction imposed by the acts amounted to no more than an arrangement between the commissioners and consumers as one body, of the terms upon which the benefits of the occupation were to be enjoyed, and could have no bearing on the question of the amount of ratable value as between the consumers and the inhabitants of Longwood. That, therefore, assuming the sum of 490*l.* to be the proper proportion of the 1,100*l.*, which, according to the above finding of the sessions had been arrived at on a right principle, as the net ratable value of the entire works, the commissioners were properly rated on that amount for the township of Longwood. *Regina v. Longwood*, 137.

3. *Held*, by WIGHTMAN, J., and CROMPTON, J., that the principle put in the finding of the sessions of a tenant released from restrictions, and at liberty to charge any rates he pleased, did not furnish the proper criterion for ascertaining the ratable value in this particular case; but as no other ground was shown for altering the ratable value from 490*l.*, that sum must be taken to be as found by the sessions, the proper proportion of ratable value. *Ib.*

4. *Poor Rates—Public Purposes.*] It is not of itself a ground for exemption from poor-rates, that the occupiers of land are trustees incorporated under acts of parliament for public purposes. It must appear from the provisions of the acts to have been the intention of the legislature that the funds derivable from their occupation should not be applied to the payment of poor-rates. *Regina v. The Trustees of Liverpool Docks*, 128.

5. *Birkenhead Docks.*] The trustees of the Birkenhead Docks were empowered by the acts incorporating them, and providing for the construction of the docks, &c., to borrow a certain sum on credit of the rates and tolls granted by the said acts, and of any property thereby vested in them, and, if necessary, to mortgage the same. The maximum tolls and dues to be demanded and received by the trustees were stated in the acts, but the trustees were at liberty to fix and determine the tolls to be taken, provided they did not exceed the amount stated in the act, and from time to time to reduce or alter, and again to raise such tolls. The acts further provided that all sums received from the rates and tolls, and all sums arising from the sale of any lands or the rents thereof, should be applied by the trustees in keeping in repair and maintaining the docks and other works made under the authority of the acts, and of paying officers and servants, and otherwise carrying the acts into execution, and also to the payment of interest and repaying the principal borrowed under such regulations and conditions as the trustees might, from time to time, think reasonable:—

Held, assuming all the purposes to which the trustees were directed to apply the sums received by them to be public purposes, that as there was nothing in the acts to show that the trustees might not lawfully raise from the rates and tolls a sum sufficient to meet such purposes and pay poor-rates and other charges, that they were liable to be rated to the poor-rate in respect of buildings upon the land vested by the acts in the trustees. *Ib.*

6. *Paving Rates—Waterworks Company.*] By the 40th section of the local act, 11 Geo. 3, c. 12, the commissioners appointed by the act were empowered to make rates

upon all persons who "shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments" within the streets, squares, &c., of a certain district, such rates not to exceed in any one year "the sum of 1s. 2d. in the pound of the yearly rents or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults, or other tenements or hereditaments respectively, as shall be situate in any of the said streets, squares, &c., the greater part or parts of which said streets, &c., respectively, shall be actually begun to be paved with new or other stones of a flat surface; and not exceeding 9d. in the pound of the yearly rents or yearly value of such of the said lands, &c., respectively, as shall be situate in any of the streets, squares, &c., which shall be actually begun to be new paved, the footways whereof shall be constructed with new or flat stones, and the carriage-ways whereof with the old stones which shall be taken up in the same or any other of the said streets, squares, &c., and not exceeding 6d. in the pound of the yearly rents or yearly value of such of the said lands, &c., as shall be situate in any of the said streets, squares, &c., which shall only be repaired by virtue or in pursuance of this act." The occupiers of houses situate at the corner of paved streets were made liable by a special provision to half of the rate only, and the act also contained special provisions as to the rating of public buildings and other specified property, but which had no express reference to the pipes and other property of a company for the supply of water. The commissioners were empowered by section 22, to alter the situation of the water pipes, &c., throughout the district.

Held, that under the 40th section an incorporated waterworks company was ratable in respect of the mains, pipes, and other apparatus laid down within the district of the commissioners. *Regina v. The East London Waterworks Co.* 94.

7. *Rating of Gaol.*] The 43 Geo. 3, c. 128 (local and personal,) for improving the town of Bedford, enacts, s. 59, that 1s. shall be assessed upon all gaols, chapels, meeting-houses, schools, alms-houses, and other public buildings, church-yards, chapel-yards, and meeting-house yards, within the said town, for every yard, running measure, of the length in front of such halls, gaols, &c. The Gaol Act, 4 Geo. 4, c. 64, s. 48, enacts that every gaol for any county or town, &c., having exclusive jurisdiction of felonies and misdemeanors, which shall be situate within the limits of any other county or town, shall be taken to be part of the county or town for which it shall be used as a gaol, so long as it shall be so used. The county gaol of Bedfordshire is situate within the town of Bedford, and the front and part of the sides and the back part, the latter consisting of a boundary wall, abut upon public roads of the town. The commissioners under the local act assessed the county justices for the frontage of the fore part, of the back part, and of part of the sides of the gaol, measured in running yards:—

Held, that the gaol was not exempt from rating by reason of the 4 Geo. 4, c. 64, s. 48, as that section related merely to jurisdiction. *The Justices of Bedfordshire v. The Bedford Improvement Commissioners*, 424.

8. *Houses of Governor of Gaol.*] The houses of the governor and warders of a county gaol were built outside a wall inclosing an area, within which the gaol stood. The front door of the governor's house opened into the public street. There was an outlet through the back wall of the house to the area. The houses of the warders were similarly situated, but did not communicate by the back wall with the area. The governor and warders had the occupation of three houses only in respect of their being such officers, and the accommodation of their houses was not more than was proper and convenient for persons having their duties to perform; and their constant residence in their houses was an important part of their duties:—

Held, that they were not liable to be rated. *The Justices of Bedfordshire v. The Overseers of St. Paul*, 424.

9. *Union Workhouse.*] An union workhouse was erected by an incorporation of guardians, under the 34 Geo. 3, c. 98, the 19th section of which enacts "that all buildings to be erected by virtue of that act shall be free from all parliamentary and parochial taxes, except such and to such amount as they were assessed to, at the time they were first taken and applied." It was afterwards rented by the guardians of a poor-law union, formed under the 4 & 5 Will. 4, c. 76:—

Held, that the workhouse was a "public building" within the meaning of the above local act, and that it was liable to be rated under that act, the rate in question not being

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- a "parliamentary or parochial tax" within the meaning of the 34 Geo. 3, c. 98. *Guardians of the Bedford Union v. The Bedford Improvement Commissioners*, 425.
10. *Infirmaries — Public Building.*] An infirmary is a "public building," within the meaning of the local act. *The Governors of the Bedford Infirmary v. The Bedford Improvement Commissioners*, 431.
11. *Frontage.*] In all the above cases, and the other subject-matters of rating mentioned in the local act, the rate ought to be imposed upon so much of the frontage of the several buildings and ground as abuts upon a public carriage-road or public footway. *Ib.*
12. *Right to begin.*] In a special case, stated under the 12 & 13 Vict. c. 45, the parties supporting the affirmative (the respondents in the present cases) are entitled to begin. *Ib.*

READINESS.

Averment of.]

See COVENANT.

REASONABLE TIME.

See BILL OF EXCHANGE.

RECEIVER.

See RAILWAYS.

RECEIVING STOLEN GOODS.

See HUSBAND AND WIFE.

RECOGNIZANCE.

Form of.] Upon removal of an indictment by *certiorari* from the Sessions of the Queen's Bench, the sureties in the recognizance become bound as sureties for the payment of the costs in the event of a verdict being found for the crown, although there are no words to that effect in the conditions to the recognizance; the 3d section of the 5 & 6 Will. & M. c. 11, being, in effect, incorporated with the recognizance. The recognizance was stated to have been entered into before "J. T., Esq., one of the justices for the county of," &c.:—
Held, good. Regina v. Hodgson, 456.

REFERENCE.

See CONDITION PRECEDENT.

REMOVAL.

See PAUPER.

RENT-CHARGE.

See LEASE.

Common Law.

RENT.

See REPLEVIN.

REPEAL.

Of a Statute — Its Effect on Proceedings.]

See INDICTMENT.

REPLEVIN.

1. *Avowry — Tithe Free.]* Replevin. Avowry, that the plaintiff was tenant to the defendant, at a rent of 400*l.* a year. The plaintiff being the owner of a farm and lessee of the tithe commutation rent-charge, under the Dean and Chapter of W., at a rent of 60*l.* a year, let the land verbally to the defendant, at a rent of 400*l.* a year, tithe free : —

Held, that as by the 80th section of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, in the event of the defendant distraining for the tithe rent, she would be compelled to allow the same to the plaintiff in account; the plaintiff was tenant to the defendant, at a rent of 400*l.*, and therefore that the avowry was proved. *Meggison v. Bowes*, 364.

2. *Avowry — Rent.]* Replevin. Avowry "that the plaintiff for a long time, to wit, for all the time during which the rent hereinafter mentioned to be distrained for, was accruing due, and from thence until and at the said time when, &c., held and enjoyed the said close in which, &c., as tenant thereof to the defendant, by virtue of a certain demise thereof theretofore made at and under a certain rent, to wit, the yearly rent of 80*l.*, and because a large sum, to wit, the sum of 80*l.*, of the rent aforesaid, for a certain time, to wit, one year, ending on the 29th of September, A. D. 1851, on the day and year last aforesaid, and from thence until and at the said time when, &c., was due and in arrear" the distress was taken. Plea in bar, *riens in arere*.

At the trial it was proved, that there was no rent due for the year ending the 29th of September, 1851, but that a portion of the previous year's rent was due : —
Held, that the plaintiff was entitled to the verdict. *Roskruge v. Caddy*, 452.

REPLICATION.

See PLEADING.

REPRESENTATIONS.

See INSURANCE.

RESIDENCE.

See PAUPER. PRACTICE.

RESOLUTION.

Of Judge in 4 Moore & Scott, 484.]

See PRACTICE.

RESPONDEAT SUPERIOR.

See SHERIFF.

Common Law.

Injury to — Remedy.]

REVERSION.

See ACTION ON THE CASE.

REVOCATION.

See CONDITION PRECEDENT.

RIGHT TO BEGIN.

See PRACTICE. RATES.

Dangers of.]

ROADS.

See BILL OF LADING.

Loss by — To Exonerate Carriers.]

ROBBERS.

See COMMON-CARRIERS.

RULES.

Reg. Gen. Hil. term, 2 Will. 4, c. 1, s. 6 — §6

Yearly — Apportionment.]

SALARY.

See CONTRACT.

SALE.

Growing Crops.] A father, in expectation that a judgment would be recovered against him, transferred his farm to his son:

Held, that if the jury found that the transfer was really made, the growing crops belonged to the son. *Stevenson v. Dickenson*, 510.

Absolute or Conditional.]

See STOPPAGE IN TRANSITU.

SATISFACTION OF JUDGMENT.

See JUDGMENT.

SEAL.

When Necessary to a Contract by a Corporation.]

See RAILWAYS.

For Costs.]

SECURITY.

See COSTS.

SEPARATE PROPERTY.

See BANKRUPT.

SERVANT,

Month's Notice — Governess.] A governess is not within the rule applicable to menial or domestic servants, that upon a general hiring, the service may be determined by a month's notice or payment of a month's wages. *Todd v. Kerrick*, 433.

SESSIONS.

1. *Interested Justice.*] Upon the trial of a parish appeal, F. S., one of the justices, who was a rated inhabitant of the appellant parish, was on the bench during the hearing, and in the course of the proceedings, referred the chairman of the Quarter Sessions to some of the documents put in evidence. Upon an observation being made that he was a party interested, F. S. stated that he should take no part in the decision, but he remained in court until the final decision, which was in favor of the appellants. It was sworn that he did not vote or give any opinion upon the question at issue, nor did he influence the decision of the other justices present, and that if he had not believed that the parties were satisfied with his assurance that he would take no part, he would have retired from the court during the trial:—

Held, that under the above circumstances, the order of sessions was invalid by reason of the presence of the interested justice. *Regina v. The Justices of Suffolk*, 90.

2. 13 Geo. 2, c. 18, s. 5.] *Held*, also, that notice of an intention to move for a *certiorari* under 13 Geo. 2, c. 18, s. 5, was properly served on F. S., as a justice "by and before whom the order of sessions was made." *Ib.*

3. *Form of Notice.*] The notice stated that application would be made for a *certiorari* "on behalf of the inhabitants" of the respondent parish, and was signed "J. M., attorney for the inhabitants of the respondent parish:"—

Held, to be sufficient. *Ib.*

SET-OFF.

4. *Debt due Executor.*] Where a defendant is sued as executor for a debt which accrued due from his testator during his lifetime, he may set off a debt which has accrued due from the plaintiff to him as executor since the death of his testator. *Mardell v. Thelluson*, 74.

5. 2 Geo. 2, c. 22.] Such debts are mutual, and due in the same right, within the meaning of the 2 Geo. 2, c. 22; the second clause of which, authorizing the set-off against an executor of debts due from the testator, does not limit the operation of the preceding clause. *Ib.*

6. *Blakesley v. Smallwood*, 8 Q. B. Rep. 538, approved. *Shipman v. Thompson*, Willes, R. 103, explained. *Ib.*

SETTLEMENT.

By a Joint-Tenant — Payment of Rent.] William Atkinson occupied a separate and distinct dwelling-house and farm in the parish of H., which were let to him and his father, Thomas Atkinson, as joint tenants, the rent and value of the land itself being sufficient to confer a settlement on both. The father resided on another farm, at a distance, but he *bonâ fide* paid the rent of the farm occupied by his son. In the rate-books of H., "Mr. Atkinson" appeared as the name of the occupier of the house and farm in respect of two rates, and in a third rate the name of "Thomas Atkinson" appeared. The overseers had demanded and received payment of these rates from the father:—

Held, that the sessions were justified in finding, first, that there was sufficient occupation and payment of rent, as well as a sufficient assessment to and payment of rates,

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to confer on William Atkinson a settlement in H., under the 1 Will. 4, c. 18, and 4 & 5 Will. 4, c. 76; and, secondly, that he had sufficiently been charged with, and paid his share of the public taxes, to gain a settlement in H., under the 3 & 4 Will. & M. c. 11. *Regina v. The Inhabitants of Hushwaite*, 111.

See PAUPER.

SHAREHOLDER.

Rights of.]

See JOINT-STOCK COMPANY

SHARES.

Order of Judge Charging Shares.]

See JOINT-STOCK COMPANY.

SHERIFF.

1. *Levying Fines.]* By the 3 Geo. 4, c. 46, s. 2, fines imposed at quarter sessions are to be inserted on the roll by the clerk of the peace, and a copy thereof, together with a writ of *distringas* and *capias*, is to be sent by him within twenty-one days to the sheriff, which is to be the sheriff's authority for levying such fines. By sect. 3, the clerk of the peace, before sending the roll to the sheriff, is to make oath that the roll is truly made up, and that the fines are, to the best of his knowledge, inserted therein, and that all fines paid to or received by him are inserted therein, without any wilful omission:—

Held, that on such roll and writ being sent to the sheriff, his duty is not merely ministerial; but that, if he has received the fine, he must not proceed to levy it, although it may appear upon the roll to be unpaid. *Wilde v. Morris*, 187.

2. *Clerk of the Peace.]* *Held*, also, that if the clerk of the peace has received the fine, he must enter it upon the roll as paid; and that if the sheriff has received it, and that fact is known to the clerk of the peace, he may enter it upon the roll as paid; but *quære*, in this latter case, if he is bound so to enter it. *Ib.*

3. By the 59 Geo. 3, c. 28, two courts may be held at quarter sessions, and the clerk of the peace is to appoint a fit and sufficient person to record the proceedings in the second court, and such proceedings are to be delivered over to the clerk of the peace, and to be equally deemed a part of the records as if recorded by the clerk of the peace himself, and the justices may make an order on the treasurer to pay to the clerk of the peace such sum as they shall deem a reasonable remuneration to the clerk for such purpose. *Ib.*

4. *Quære*, whether the person so appointed is the servant of the clerk of the peace, so as to render the latter liable for the negligence of the former, or so as to make a receipt by such person, of a fine imposed at quarter sessions, a receipt by the clerk of the peace? *Ib.*

5. *Quære*, also, if such person has authority to receive fines imposed at quarter sessions, so as thereby to charge the clerk of the peace with the receipt of them? *Ib.*

6. Where such person had received in court a fine so imposed, and had handed it over to the undersheriff, but made no record of such payment, and the clerk of the peace, not knowing that such payment had been made, inserted the fine on the roll as unpaid, and the sheriff thereupon levied the fine:—

Held, that the clerk of the peace was not bound to enter the fine as paid unless his appointee was his servant, acting within his authority. *Ib.*

7. *Held*, also, that the sheriff ought not to have levied the fine; and, per ERLE, J., that he was responsible to the party levied upon for having done so. *Ib.*

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8. *Fee — Distringas.*] A levy having been made under a writ of *distringas*, the debt and costs were paid, when the sheriff refused to return the 40s. issues unless he was allowed a "discharge fee" of 4s. 6d.:—
Held, that the sheriff was not entitled to such fee. *Taylor v. Warrington*, 166.

See OFFICER.

SHIPS AND SHIPPING.

1. *Charter-Party — Freight.*] The defendant chartered a ship to bring from Bombay, at 3*l.* 5*s.* per ton, a cargo, not being his own, but for the purpose of making a profit on an increased rate of freight. The defendant's agents filled the carrying part of the vessel and then the cabin with their own goods, which were consigned to the defendant, as their factor, for sale. There was contradictory evidence as to the amount to be paid for the cabin freight. The defendant refused to pay the plaintiff more than 3*l.* 5*s.* per ton for the freight of the cabin goods, but had charged his agents with the payment of 7*l.* per ton, and had allowed them commission at that rate. The goods having been stopped for the non-payment of a bill of exchange, given in respect of them, the defendant, after the commencement of the action, the bill having been paid, obtained possession of the goods:—
Held, first, that the judge rightly directed the jury that, although the defendant's agents at Bombay had no authority to put the goods into the cabin, yet if they did so, and the defendant on the ship's arrival took to them and received the freight, he was bound to pay the plaintiff the current freight, and was not confined to the charter-freight of 3*l.* 5*s.* per ton. *Micheson v. Nicol*, 398.
2. And, secondly, that the action was not brought too soon, for that the taking to the cabin cargo for the purpose of obtaining the freight rendered the defendant liable irrespectively of the possession obtained after action brought. *Id.*
3. *Right of Master to sell Cargo for Repairs.*] A declaration in *assumpsit* stated that the defendant was the owner of a certain ship at a certain port beyond the seas, and bound from thence to London; that the plaintiffs caused certain goods to be shipped on board the said ship at the said port, to be carried thence to London, and then delivered to the plaintiffs for certain freight; that the ship set sail and proceeded on her voyage; that having been injured by tempestuous weather, the master was obliged to put into the port of Monte Video, in order to have her repaired; that to pay for these repairs, it became necessary for the master to raise money, and without his so doing the vessel would have been unable to leave the port; and that the master not being able to obtain the money otherwise, took the goods of the plaintiffs and sold them for a certain sum, with which he paid the expenses of the repairs; that the defendant promised to pay the plaintiffs the value for which the goods would have been sold had they been delivered by the defendant to the plaintiffs in London.
Plea, so far as the declaration claims or seeks to recover damages beyond the value of the ship and freight thereafter mentioned, in respect of the breaches of promise complained of, that the plaintiffs ought not to maintain their action to recover damages to a greater amount than aforesaid, because, after the goods were shipped, and before any part had been conveyed to London, and whilst they were in the custody and under the control of the master, the master wrongfully and without any authority from the defendant, and without his knowledge, privity, or consent, sold the goods, and the defendant thereby was unable to deliver them to the plaintiffs. That the defendant, at the said time when, &c., was the owner of a British ship duly registered; that the goods were shipped by being received into the custody of the master; and that the defendant never personally accepted or received, nor did he interfere with them or the shipping or the sale, except as such owner of the vessel; that the shipping and sale took place after the 1st of September, 1813, and that the sale was done without the fault or privity of the defendant; and further that the value of the ship, together with the value of the freight due or to grow due during the voyage, did not exceed a certain sum therein named:—
Held, on special demurrer, first, that the plea was bad, as it was pleaded merely to the damages. *Atkinson v. Stephens*, 407.

Common Law.

4. *Damages for Goods so Sold — Pleading.*] Secondly, that when goods forming part of the freight of a ship have been sold at an intermediate port to defray expenses necessarily incurred in repairing the vessel, the merchant is not entitled to claim from the ship-owner the price which they might have realized at the port of delivery unless the ship arrives; and that as the declaration did not contain any averment of the arrival of the ship at her port of destination it was bad. *Ib.*
5. 53 Geo. 3, c. 159.] *Semble*, that the plea did not bring the case within the 53 Geo. 3, c. 159. *Ib.*

See BILL OF LADING.

SLUICE.

See DEED.

SPECIAL DEMURRER.

See PRACTICE.

SPECIAL JURY.

See PRACTICE.

SPECIAL TRAVERSE.

See PLEADING.

SPECIAL CONTRACT.

See COMMON-CARRIERS.

SPECIAL BAIL.

See BAIL.

SPECIFICATION.

See PATENT.

STAKEHOLDER.

See EVIDENCE.

STAMP.

1. *Agreement — Memorandum.*] An agreement was entered into between the plaintiffs and R. O., and the defendants, by which the former were to withdraw their opposition to the passing of an act of parliament for reclaiming certain waste land, in consideration of the payment of 1,000*l.* and the allotment to them of certain portions of the waste land, and it was stamped with a 35*s.* stamp. A few weeks afterwards the following memorandum was indorsed upon it:—“Memorandum. It is understood between the parties within-named, that the within-mentioned wardens and commonalty [the plaintiffs] and the said R. O., are only severally, and not jointly, held and bound for

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the fulfilment of the within-mentioned agreement on their own respective parts, but not for each other; and that the sum of 1,000*l.*, within mentioned to be paid to the said wardens and commonalty, is for certain costs and expenses which they, the said wardens and commonalty, have been put to during the present year, partly in the survey made by Mr. M'N., and for his plans and valuations, which survey, plans, and valuations the several persons within-named to be parties of the third part are to have the benefit of, but that they are to be forthwith returned to the said wardens and commonalty if the said sum of 1,000*l.*, shall not be duly paid as within mentioned; and it is also agreed, that the within-mentioned agreement for withdrawing the opposition and facilitating the bill as within mentioned, shall only be and remain in force for the present session of parliament, 1837 and 1838." The memorandum was stamped with a 1*l.* stamp, and, together with the agreement, contained more than 1,080 words:—

Held, that the memorandum was a distinct agreement and so sufficiently stamped with a 1*l.* stamp. *Fishmongers Company v. Dimsdale*, 197.

2. *Held*, also, that if it had incorporated the agreement on which it was indorsed, the number of words in the agreement was immaterial, and that then it was a case not exactly met by the words of the Stamp Act. *Ib.*

See EVIDENCE.

STATUTES.

Repeal of—Effect on Cases Pending.]

See INDICTMENT.

STATUTES CITED, EXPOUNDED, &c.

8 Hen. 6, c. 7,	299
8 Hen. 6, c. 7,	264
10 Hen. 6, c. 2,	299
11 Hen. 6, c. 2,	264
13 Eliz. c. 10, s. 3,	451
43 Eliz. c. 2, s. 1,	133
29 Car. 2, c. 2, s. 4,	350
Anne c. 14, s. 1,	451
2 Geo. 2, c. 22,	74
3 Geo. 2, c. 25, s. 15,	326
9 Geo. 2, c. 36,	229
11 Geo. 2, c. 19,	489
11 Geo. 2, c. 19, s. 1,	482
18 Geo. 2, c. 18, s. 5,	299
18 Geo. 2, c. 18,	264
24 Geo. 2, c. 44, s. 8,	394
11 Geo. 3, c. 12,	94
34 Geo. 3, c. 98,	430
43 Geo. 3, c. 49,	116
43 Geo. 3, c. 128,	425
57 Geo. 3, c. 29,	69
59 Geo. 3, c. 28,	181
3 Geo. 4, c. 46,	181
4 Geo. 4, c. 64, s. 48,	425
6 Geo. 4, c. 16, s. 56,	403
6 Geo. 4, c. 16, s. 84,	334
6 Geo. 4, c. 16, s. 63,	449
6 Geo. 4, c. 57,	113
6 Geo. 4, c. 120, s. 5,	1
7 & 8 Geo. 4, c. 29, s. 53,	135
9 Geo. 4, c. 61, s. 26,	555

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10 Geo. 4, c. 56, s. 27,	896
3 & 4 Will. & M. c. 11,	111
5 & 6 Will. & M. c. 11,	144
5 & 6 Will. & M. c. 11, s. 2,	456
5 & 6 Will. & M. c. 11, s. 3,	458
1 Will. 4, c. 18,	111
1 Will. 4, c. 66, s. 10,	556
1 & 2 Will. 4, c. 56, s. 25,	449
2 Will. 4, c. 39,	421
2 Will. 4, c. 45, s. 32,	323
3 & 4 Will. 4, c. 42, s. 23,	255
4 & 5 Will. 4, c. 36, s. 16,	135
4 & 5 Will. 4, c. 76,	111
4 & 5 Will. 4, c. 22,	23
5 & 6 Will. 4, c. 76, s. 17,	149
5 & 6 Will. 4, c. 76,	555
6 & 7 Will. 4, c. 71,	364
1 Vict. c. 26,	49
1 Vict. c. 26, s. 26,	41
1 Vict. c. 38, s. 18,	163
1 & 2 Vict. c. 110,	34
1 & 2 Vict. c. 110,	161
1 & 2 Vict. c. 110,	447
1 & 2 Vict. c. 110, s. 14,	390
1 & 2 Vict. c. 110, s. 37, 44,	77
3 & 4 Vict. c. 61, s. 2,	145
6 Vict. c. 18, s. 7,	267
6 & 7 Vict. c. 18,	256
6 & 7 Vict. c. 18, s. 50 & 64,	325
7 & 8 Vict. c. 79,	130
7 & 8 Vict. c. 85,	535
7 & 8 Vict. c. 96,	421
7 & 8 Vict. c. 101, s. 35,	172
7 & 8 Vict. c. 110,	386
7 & 8 Vict. c. 110, s. 44,	285
8 Vict. c. 16, s. 97,	18
8 Vict. c. 20, s. 13, 14, 15,	309
8 & 9 Vict. c. 6,	276
8 & 9 Vict. c. 16, s. 85, 86,	306
9 & 10 Vict. c. 95, s. 60,	45
9 & 10 Vict. c. 95, s. 58,	163
9 & 10 Vict. c. 95, s. 65,	294
9 & 10 Vict. c. 95, s. 128,	358
10 & 11 Vict. c. 34,	104
10 & 11 Vict. c. 102,	34
10 & 11 Vict. c. 225,	541
11 & 12 Vict. c. 43, s. 31,	555
11 & 12 Vict. c. 45,	37
12 & 13 Vict. c. 35,	104
12 & 13 Vict. c. 103, s. 5,	102
12 & 13 Vict. c. 106,	245
12 & 13 Vict. c. 106,	360
12 & 13 Vict. c. 108,	37
13 & 14 Vict. c. 61,	479
13 & 14 Vict. c. 61,	358
13 & 14 Vict. c. 61, s. 1,	294
13 & 14 Vict. c. 91, s. 91,	555
13 & 14 Vict. c. 115, s. 22,	396
14 & 15 Vict. c. 19, s. 1,	568
14 & 15 Vict. c. 90, s. 6,	513
15 & 16 Vict. c. 76,	253
15 & 16 Vict. c. 76,	415

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15 & 16 Vict. c. 76,	469
15 & 16 Vict. c. 76, s. 80,	442
15 & 16 Vict. c. 83, s. 42,	169
15 & 15 Vict. c. 83, s. 42,	460

STEEL.

Manufacture of.]

See PATENT.

STOCKHOLDER.

Liability of.]

See JOINT-STOCK COMPANY.

STOPPAGE IN TRANSITU.

1. *Bill of Exchange.]* In 1845, the defendants, commission agents in London, wrote to the plaintiffs, merchants at Madras, as follows:—"At the request of Messrs. K. & L., of Glasgow, we beg to open a credit in your favor to the extent of 1,500*l.* to be applied to the execution of an order they have given you for Madras handkerchiefs, and for cost of which, as produced, you draw on us at the customary date, on forwarding bills of lading to our order." Two orders were subsequently given by K. & L., and executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills drawn on them in pursuance of the letter. In February, 1847, K. & L. wrote to the plaintiffs, with a third order:—"You will draw for cost and consign goods as before." The plaintiffs accordingly shipped the goods on account of K. & L., and sent to the defendants the invoice and bill of lading, inclosed in a letter, saying, "We have, as usual, drawn upon you at six months, for the equivalent of the amount of the invoice." The bill of lading stated the goods to have been "shipped by the plaintiffs, and to be deliverable to the defendants or their assigns on payment of freight." The invoice stated that the goods were "consigned to the defendants, on account and risk of K. & L." The defendants received the bill of lading and invoice together, on the 26th of August, and the goods arrived in London on the 21st of October. On that day the plaintiffs' agent received a bill drawn upon the defendants against the goods, but, on presentment, the defendants refused to accept it. On the 27th of October, K. & L. stopped payment. The defendants took possession of the goods under the bill of lading, and sold them, and retained the proceeds. On the 4th of March, 1848, the plaintiffs gave the defendants notice that they claimed to stop the goods *in transitu*, the bills not having been accepted. In an action to recover the proceeds of the sale as money received to the use of the plaintiffs:—

Held, first, that it was a question for the judge, and not for the jury, to decide what the contract between the parties was. *Key v. Cotesworth*, 435.

2. *Delivery.]* Secondly, that the property in the goods vested absolutely in K. & L. upon the delivery on board the ship, and transmission of the bill of lading to the defendants; the acceptance of the bill not being a condition either precedent or subsequent. *Id.*

SUBSTANTIAL JUSTICE.

Courts cannot depart from a general rule of practice, in order to do substantial justice in a particular case. *Freeman v. Tranch*, 224.

SUBSCRIPTION.

For Shares in a Corporation — Construction of.]

See JOINT-SOCK COMPANY.

Common Law.

SUPPRESSIO VERI.

See INSURANCE.

SURETY.

See BANKRUPT. INSURANCE.

SURETIES.

Liability of—Costs.]

See RECOGNIZANCE.

TAXES.

See RATES.

When Payable.]

See ELECTIONS.

TENANCY.

From Year to Year.]

See LEASE.

TENANT.

See REPLEVIN. LANDLORD AND TENANT. LEASE.

THIEVES.

Loss by—To Exonerate Carriers.]

See COMMON-CARRIERS.

THOROUGHFARE.

See WAY.

TITHES.

See REPLEVIN.

TITLE.

What is a good Title.]

See STATUTE OF FRAUDS.

TRADE ASSIGNEE.

Rights of.]

See BANKRUPTCY.

TRAVERSE.

See PLEADING.

TRESPASS.

1. *Damages.]* In an action of trespass, where the plaintiff proves by parol that he occupies the premises under a written agreement from W., and the defendant produces a lease from W., made and taking effect about the time of the acts complained of as trespasses; in order to entitle him to a more than nominal damages, the plaintiff must show the duration of his interest, which he can only do by the written instrument. *Twyman v. Knowles*, 318.
2. *Officer—Arrest—Warrant.]* Trespass for false imprisonment. The defendant, Barnes, having obtained a warrant to search the plaintiff's house, and to apprehend him on a charge of felony, the warrant being headed "To the constable of D., in the county of W.," delivered it to the defendant, Barton, a county constable, appointed under

Common Law.

the 2 & 3 Vict. c. 93, who executed it within the parish of D., by apprehending the plaintiff. The action was not brought until the expiration of six months from the time of the act committed :—

Held, first, that trespass was the proper form of action. *Freegard v. Barnes*, 394.

2. Secondly, that the parish constable of D., and not the defendant, Barton, was the proper party to execute the warrant, but that Barton was protected, the action not having been brought against him within six months, pursuant to the 24 Geo. 2, c. 44, s. 8, and that the other defendant was liable. *Ib.*

See DEED. DISTRESS.

When it becomes Larceny.]

See LARCENY.

TROVER.

1. *Conversion by a Railway Co.*] The plaintiffs intrust goods to the Y. and N. M. Railway Company to be conveyed from H. to N. The goods arrived at N., the defendants' station, by the A railway, belonging to an intermediate company. The plaintiffs demand them of the defendants, offering to pay any charges or lien, but the defendants refuse to deliver them up, upon the ground that by an agreement with the A. company, the latter had no right to bring such goods to the defendants' station, and insist upon their being taken back to the A. line :—

Held, that the defendants were liable in trover for the goods; that the detention of them by the defendants, after a demand made upon their station-master, was sufficient evidence of a conversion; and that the plaintiffs were entitled to have their goods, though brought by mistake or without right on the premises of the defendants. *Rooke v. The Midland Railway Co.* 175.

2. *Semle*, it was unnecessary for the plaintiffs to show, when they demanded the goods, that they had paid all charges of the other companies, or to produce an authority from those companies for the delivery of the goods. *Ib.*

By the Assignees of a Bankrupt.]

See BANKRUPTCY.

TROTting MATCH.

See EVIDENCE.

TRUSTEE PROCESS.

See BAIL.

TUNNEL.

See RAILWAYS.

UNION WORKHOUSE.

Ratability of.]

See RATES.

UNILATERAL CONTRACT.

See CONTRACT.

USE AND OCCUPATION.

See RAILWAYS.

UTTERING.

What is.]

See FORGERY.

VARIANCE.

See BANKRUPT. BURGLARY. NAME.

Common Law.

VENDORS.

See STOPPAGE IN TRANSITU.

VERDICT.

Perverse.] POLLOCK, C. B. My definition of a perverse verdict is this — when a jury choose not to take the law from the judge, but will act on their own erroneous view of the law. In such cases, however honest the intentions of the jury may be, their verdict is perverse. *Saunders v. Davies*, 532.

VOLUNTARY CONVEYANCE.

See INSOLVENT.

VOTERS.

See ELECTIONS.

WARRANT.

Proper Service of.]

See TRESPASS.

WARRANTY.

See INSURANCE.

WATERWORKS.

Liability for Poor Rate.]

WAYS.

1. *Highway — Thoroughfare.*] A public highway may, in point of law, exist over a place which is not a thoroughfare. *Bateman v. Bluck*, 69.
2. *Pleading.*] To a declaration in trespass for entering the plaintiff's close and pulling down a wall there, the defendant pleaded that the close in question was a paved public place, within the meaning of the Metropolitan Paving Act (57 Geo. 3, c. 29,) and that the plaintiff had unlawfully, and contrary to the provisions of the said act, erected thereon the said wall; and because the said wall, at the said time when, &c., remained incumbering the said public pavement, and because the plaintiff, upon the request of the defendant, refused to remove the same, the defendant entered upon the said close and pulled down the said wall: —
Held, (after verdict for the defendant,) that the plea was bad, as it did not show any necessity for the defendant's using the portion of the pavement obstructed by the wall, or that it interfered with the exercise of his right of passage.

Abandonment of.]

See ABANDONMENT.

Indictment for Non-repair.]

See INDICTMENT. BRIDGE.

WILL.

1. *Leaseholds — 1 Vict. c. 26.*] A testator by his will, made in 1815, gave "all the rest, residue, &c., of his personal estate, goods and chattels, &c." to M. J. D. absolutely; and he further devised "all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, &c., at or near W., in the county of D., and B., in the county of Y., and all other his real estates in the said counties and elsewhere, and all his estate and interest therein," to uses in strict settlement. In 1841 the testator made a codicil ratifying and confirming his will. At the time of his making his will and of his decease, the testator was possessed of free-

Common Law.

hold estates in the county of D., and of some church leases in the same county, which were usually renewable every seven years; in some instances the leaseholds were let and occupied with the freeholds, at undivided yearly rents. Upon part of the leaseholds, nearest to the freehold mansion, ornamental cottages were built, as well as buildings occupied by persons employed about the mansion and freehold estate:—

Held, that, under the 1 Vict. c. 26, s. 26, the leaseholds passed under this general devise, and that no contrary intention appeared upon the will so as to prevent the operation of that section. *Wilson v. Eden*, 41.

2. *Construction—Fee Simple.*] A testator by his will (made before the passing of the 7 Will. 4, & 1 Vict. c. 26,) devised as follows:—"I give and bequeathe to my son J. W. all that farm or estate I bought of Mr. B., of London, containing about twenty acres, situate at the Quinton, in the parish of H., in the county of S., and in the occupation of myself, my son G. W., and W. J.:"—

Held, that the son took an estate in fee-simple in the property. *Burton v. White*, 499.

3. *Lunatic.*] In 1815, the deceased was placed in confinement as a lunatic, and there remained till 1847, when he was released. In 1820, he made a rational will, which was written for him by his mother. In 1822, he was again placed in confinement, and so remained till his death, in 1849. In 1838, he was found, on a commission, to have been of unsound mind, without lucid interval, since 1815. On the evidence, the will pronounced for. *Bannatyne v. Bannatyne*, (Ecc.) 581.

4. Acts of business are strong evidence in a case of illegal idiocy, as distinguished from a case of mania. *Ib.*

5. *Attestation.*] The subscribing witnesses to a will, examined two years after the transaction, deposed to seeing the deceased write on a paper, and to their signing such paper, but they would not swear to what he wrote being his name, nor the name of the deceased being on the will when they so subscribed. They identified the paper subscribed by them, on which was the signature of the deceased. The attestation clause was full, and the deceased knew the requisites of execution:—

Held, that on the evidence, the will was entitled to probate. *Thompson and Allaway v. Hall*, (Ecc.) 595.

See LEGACY.

WILLINGNESS.

Averment of.]

See COVENANT.

WINDING-UP ACTS.

See JOINT-STOCK COMPANY. RAILWAYS.

WITNESS.

Cannot be Contradicted on Collateral Issue.] The defendant being sued as executor of A, in respect of a promissory note, purporting to be signed by A and B, but alleged by the defendant to be forged, stated, in cross examination, that he had not heard B admit having signed the note:—

Held, that the plaintiff was not at liberty to contradict the defendant by showing that the latter had heard B make the admission. *Palmer v. Trower*, 470.

WORK AND LABOR.

See SERVANT.

WRIT OF TRIAL.

See PRACTICE.

YEAR'S HIRING.

See SERVANT.



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